-123-

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 6. ORIGINAL.

EX PARTE: IN THE MATTER OF J. B. McCABE, PETITIONER.

PETITION FOR A WRIT OF HABEAS CORPUS.

FILED OCTOBER 12, 1887.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Minute entry of motion for leave to file petition	*a*	1
Order allowing petition to be filed and granting writ	*b*	1
Petition for writ of *habeas corpus*	*c*	1
Exhibit—Transcript of record in case of Cooper *et al.* *vs.* Mayre, auditor, &c.	*g*	3
Style of cause	1	3
Original bill	2	3
Exhibit "A" with bill	8	8
Restraining order	12	10
Rule *vs.* McIntosh & McCabe	14	11
Affidavit of S. Bolling and exhibits therewith	14	12
Answer of McCabe	20	14
Order of leave to file amended bill	30	18
Amended bill	31	18
Order postponing hearing	37	23
Rule against Scott	38	23
Affidavit of Wm. L. Royall and Exhibits	38	23
Answer of John Scott	46	28
Order granting leave to file second amended bill	59	32
Second amended bill	61	33
Order granting leave to file third amended bill	70	36
Third amended bill	72	37
Answer of J. L. Gleaves	80	39
Order granting preliminary injunction	84	41
Answer of R. A. Ayers	85	41

JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 17, 1887.

	Original.	Print.
Order committing R. A. Ayers for contempt	87	42
Order committing J. B. McCabe for contempt	87	42
Order committing John Scott for contempt	88	43
Order enlarging Rule *ex.* Gleaves	89	43
Certificate of clerk	91	44
Opinion of the court	92	44
Writ of *habeas corpus* and proof of service of same	*h*	49
Return to writ of *habeas corpus*	*j*	50
Stipulation to amend title of cause, mentioned in return to writ	*n*	51
Order committing prisoners to charge of Marshal Supreme Court of the United States	*p*	52

a Supreme Court of the U. S. October Term, 1887.

Ex Parte in the Matter of RUFUS A. AYERS, Petitioner.

Ex Parte in the Matter of JOHN SCOTT, Petitioner,

and

Ex Parte in the Matter of J. B. MCCABE, Petitioner.

Mr. William W. Gordon, of counsel for the petitioners, submitted to the consideration of the court motions for leave to file petitions for writs of *habeas corpus*.

Oct. 11, 1887.

b Supreme Court of the U. S. October Term, 1887.

Ex Parte in the Matter of RUFUS A. AYERS, Petitioner,

Ex Parte in the Matter of JOHN SCOTT, Petitioner,

and

Ex Parte in the Matter of J. B. MCCABE, Petitioner.

On consideration of the motions for leave to file petitions for writs of *habeas corpus*, it is now here ordered by the court that said motions be, and the same are hereby, granted; and it is further ordered that writs of *habeas corpus* issue as prayed in said petitions, returnable on the 17th instant.

Oct. 12, 1887.

c To the honorable judges of the Supreme Court of the United States:

Your petitioner, J. B. McCabe, respectfully shows that he is a citizen of the United States of America, a resident of the State of Virginia, and that he is the Commonwealth's attorney for the county of Loudoun, in the said State; and that as such officer it became his duty to perform certain acts, which are set forth in the record accompanying the petition of Rufus A. Ayers, this day filed, and which your petitioner prays may be taken as a part of this his petition. Your petitioner asserts that the said record shows that the suit in which certain orders of the honorable judge of the court before whom it is pending was entered, and of which said acts your petitioner herein complains, is one over which the said honorable judge had no jurisdiction. Your petitioner further asserts that the said honorable judge, acting in the said case, over which your petitioner respectfully insists he had no jurisdiction, entered on the 8th day of October, 1887, the following order:

"*In re* J. B. MCCABE.

"This matter came on this day to be heard upon the rule heretofore issued against J. B. McCabe, Commonwealth's attorney for the county of Loudoun, to show cause why he should not be attached for contempt indisobeying the restraining order of this court heretofore granted in the suit of Cooper *et als. vs.* Marye *et al*, now pending in

court, and his answer thereto. On consideration whereof the court is of the opinion and doth order and adjudge that the said J. B. McCabe is guilty of contempt in his disobedience of said order, and that he do forthwith dismiss all suits under the act of May 12th, 1887, now pending in the circuit court of Loudoun county.

And the court doth further order and adjudge that the said J. B. McCabe, for his said contempt, be fined the sum of $100.00; that he be taken into the custody of the marshal of this court and by him held until the said fine be paid and he purge himself of said contempt by dismissing the suits brought or prosecuted in violation of the restraining order of this court, and that he pay the costs of these proceedings.

HUGH L. BOND, *Circuit Judge.*"

Your petitioner states that, believing that the said judge was without jurisdiction in the cause, and therefore without authority to enter said last-named order, — declined to pay the fine so imposed or to comply with the other requirements therein made, and thereupon your petitioner was ordered by the said judge into the actual custody of Thomas W. Scott, U. S. marshal for the eastern district of Virginia, until your petitioner should fully comply with the requirements of said order.

Your petitioner further asserts that he is now detained under said order in the custody of said marshal and is held by him for the purpose and with the intention of carrying your petitioner to the city jail of the city of Richmond, in Virginia.

Your petitioner insists that, as the said judge was without jurisdiction over the said cause in which he entered the said last named order, under which your petitioner is detained and imprisoned your petitioner is now so illegally detained without authority or due process of law.

Wherefore, to be relieved of said unlawful detention e your petitioner prays that a writ of *habeas corpus*, to be directed to the said Thomas W. Scott, United States marshal aforesaid, may issue in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may require.

J. B. McCABE.

Verification.

UNITED STATES OF AMERICA,
Eastern District of Virginia:

J. B. McCabe, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made are true, as he verily believes.

Subscribed and sworn to this 10th day of October, 1887.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

f [Endorsed:] Sup. Court U. S. 1887, Oct'r term. No. 6. Original. *Ex parte* in the matter of J. B. McCabe, petitioner. Petition for writ of *habeas corpus*. Filed Oct'r 12, 1887.

g In the Circuit Court of the United States for the Eastern District of Virginia. In Equity.

JAMES P. COOPER and Others
against
MORTON MARYE, Auditor, &c., and Others. } No. 432.

Transcript of Record.

1 In the Circuit Court of the United States for the Eastern District of Virginia, at Richmond, Virginia, October 8th, 1887. In Equity.

JAMES P. COOPER, H. R. BEETON, F. J. BURT, H. J. CHINNERY, W. M. Chinnery, F. P. Leon, and W. G. Woolston,
against
MORTON MARYE, Auditor of the State of Virginia, R. A. Ayers, Attorney General thereof, the Treasurers of Counties, Cities, and Towns in Virginia, and the Commonwealth Attorneys of Counties, Cities, and Towns in said State, whose Names Complainants have leave to Insert as they may be Discovered. } No. 432.

Be it remembered that heretofore, to wit, on the 6th day of June, 1887, before the Honorable Hugh L. Bond, circuit judge of the United States for the fourth judicial circuit and eastern district of Virginia, at chambers, in the city of Baltimore, Maryland, came the complainants, by counsel, and presented their bill of complaint against the defendants, which bill, with the exhibit attached thereto, is in the words and figures following, to wit:

2 *Bill of Complaint.*

Circuit Court of the United States for the Eastern District of Virginia.

JAMES P. COOPER and *als. vs.* MORTON MARYE and *als.*

To the Hon. Hugh L. Bond, judge thereof:

Complaining, showeth unto your honor your orators, James P. Cooper, H. R. Belton, F. J. Burt, H. T. Chinnery, W. M. Chinnery, F. P. Leon, W. G. Woolston, who sue for themselves as well as for all others in like situation who will come in and share the expenses of this suit, that they are citizens of the Kingdom of Great Britain, and subjects of Her Majesty Victoria, queen thereof; that by an act of her General Assembly, approved March 30th, 1871, the State of

Virginia provided for the issuing of a large number of her bonds to bear interest coupons, which she thereby contracted should be received in payment of all taxes, debts, and demands due to her, and her proper officers did issue thereafter many millions of dollars of said bonds as provided by said act, with said coupons attached thereto.

That by another act of her General Assembly, approved March 28th 1879, she provided for issuing another series of bonds, with like interest coupons attached thereto, and her proper officers did thereafter issue many millions of dollars of her bonds as provided by said act, with said coupons attached thereto.

That said coupons issued under both of said acts are payable to the bearer, and both as a contract to pay interest and as a contract that they shall be received in payment of taxes they are negotiable instruments for all time, free in the hands of any *bona fide* purchaser for value from any equity or burden whatever; that there are
3 at this time overdue and outstanding in the hands of the public at large more than $4,000,000 of these overdue coupons; that from the time said State issued said coupons and placed them upon the markets of the world her Legislature has been industriously at work seeking to destroy the same and make them of no value, and all the legislation hereinafter referred to is part of one scheme and plan to destroy the same and make them of no value; that by the 15th section of an act of her General Assemply, approved February 14th, 1882, all her officers are forbidden to pay and redeem the same according to the tenor of her contract as promises to pay interest on her said bonds; that by an act of her General Assembly, approved January 26th, 1882, the collectors of her taxes are forbidden to receive the same in payment of any taxes due to her; that after the enacting of both these statutes, to wit, in the month of ——, 1885, the Supreme Court of the United States decided, in the case of Poindexter *vs.* Greenhow, that a tender of said coupons by a tax-payer to the said State's collector of taxes paid and extinguished said tax due to her so as to deprive her Legislature of power to cause that tax-payer to be thereafter molested in respect to said tax.

That while her Legislature had made said coupons by the two acts above mentioned valueless as claims upon said State for money or as mediums by which taxes due to her might be paid and extinguished in the popular sense of those words, yet this decision of the Supreme Court attached to them an important value as tender in payment of taxes, whereby the tax-payer would become possessed of a shield and barrier between himself and said State, whereby he could prevent her from demanding of him anything else in payment of his taxes as aforesaid; that when said court made the decision aforesaid the market value of said coupons was very greatly depressed, the same being less than fifty cents on the dollar; but said decision gave a certain intrinsic value to said coupons which justified reasonable men in believing that the market value thereof would greatly enhance in value; that acting on their faith in the said decision of said Court and the belief caused thereby that the said State would be utterly unable by any legislative enactment to impair the value

of said coupons as tender for taxes, your orators bought a large quantity of said coupons in the open money market of the city of London and elsewhere, the same amounting to more than $100,000, at less than fifty cents on the dollar, the whole costing more than $30,000.

That your orators made this purchase for the purpose of selling said coupons to the tax-payers of Virginia, to be used by them as tenders for taxes due said State, many of which they have
4 sold to said tax-payers, and your orators believe, and were justified in believing, that they would be able to sell said coupons to said tax-payers at a considerable advance over and above the price paid by them by reason of the quality imparted to them by said decision of valid tenders in payment of taxes.

That whilst said acts above mentioned, forbidding payment of said coupons in money and forbidding the receipt of them for taxes, were in force the Legislature of Virginia enacted another statute, which was approved on the 12th day of May, 1887, a copy of which is hereto attached, marked A, whereby the treasurer of each county, city, and town in the State is ordered to furnish to the Commonwealth's attorney thereof a list of all persons who have tendered the said State's coupons in payment of their taxes, and said Commonwealth's attorneys are ordered to institute suits by summary proceedings in the name of said State against all such persons to recover a judgment against them for the amount of said taxes so previously due by them; that the said tax-payers are thereby required to submit to a judgment against them by default or to appear in court and plead a tender of said coupons, and then prove affirmatively that the coupons tendered by them are the State's coupons and not counterfeit and spurious coupons, the burden of proving the same being placed upon the tax-payer and the coupon being taken to be *prima facie* spurious and counterfeit.

That said act is repugnant to section ten of article one of the Constitution of the United States for the reason that, taken in connection with said act before mentioned of January 26th, 1882, it first commands the State's officers to refuse to receive those coupons which are undoubtedly her own as well as those which are spurious (and your orators charge that there are none such), and then commands her officers to bring said suits against those who have tendered said coupons of said State, as well as against those who have tendered spurious coupons; that it imposes upon the defendants heavy costs and fees, although all taxes due by them were paid by said tender, and it makes the judgment to be recovered in said suit a perpetual lien upon all the property of said tax-payer for said taxes, and for said costs and fees also, thus fixing a perpetual cloud upon the title of said tax-payer to his property.

That by another act of the General Assembly of said State, approved January 26th, 1886, it is provided that upon a trial of the issue to be made up under said act of March 12, 1887, the defendant shall produce the bond from which the coupon so tendered by him was cut, and prove that it was cut from said bond.

5 Your orators charge that very few of said bonds are owned by persons residing in Virginia, and in ninety-nine per cent.

of the cases the Virginia tax-payers would be utterly unable to produce said bonds.

That by another act of said General Assembly, approved ——, 1886, it is provided that the tax-payer undertaking to prove said tender shall not be allowed to introduce expert evidence to prove the genuineness of said coupons, and all that have been issued under either of said acts are engraved only as said acts provided they may be, and are not signed manually.

Therefore said tax-payers who cannot produce said bonds will be utterly unable to prove their coupons to be genuine upon said trial, the State thus forcing them into a lawsuit in her own courts, in which she has taken effectual precautions beforehand to make it impossible they can win and to make it a legal certainty that they must lose when they cannot produce said bonds; that said act is a device and trick enacted to take away from and deprive said coupons of their value as tender for taxes.

That the great bulk of Virginia's tax-payers pay small sums, and if her officers are allowed to enforce said act of May 12th, 1887, against them the profit to be derived from purchasing your orators' coupons will be too small to induce them to do so, and, indeed, it will be impossible for them to use said coupons at all, except in the very limited cases in which they can produce said bonds.

That the supreme court of appeals of the State of Virginia has decided in the winter of 1886–'7 that said acts requiring said bonds to be produced and forbidding the use of expert testimony are valid acts and not repugnant to the Constitution of the United States; that therefore, if the officers of said State are permitted to enforce said act of May 12th, 1887, your orators will not only lose the profit which they had a right to expect they would make when they purchased said coupons, but they will be unable to sell them to Virginia's tax-payers at any price, and thus their entire property in the same will be destroyed; and your orators charge and aver that in any event, unless they are granted the injunction hereinafter prayed for, they will lose a sum greater than $2,000.

Your orators would show further that there are in the State of Virginia about one hundred counties, cities, and towns, and that there is a treasurer and Commonwealth's attorney for each, but they have been compelled to present this bill so hastily that they have not yet been able to ascertain the name of each, which names they pray they may be allowed to insert in this bill when they as-
6 certain them. They are informed and believe and so charge that the treasurer of each county, city, and town in said State is about to report to each Commonwealth's attorney the name of every tax-payer who has tendered coupons, and each Commonwealth's attorney is going at once to institute the suits provided for by said act of May 12th, 1887, against persons holding coupons bought from your orators, as well as against all others; and they are informed and believe and so charge that in every case in which tenders of coupons have been made to the auditor of the State, who is Morton Marye (and many have been made to him), the said auditor, and Hon. R. A. Ayers, who is attorney general thereof, are about to

institute the suits which said act provides for their instituting, whereby all coupons which your orators have sold to Virginia tax-payers will be condemned as spurious, although they are all genuine coupons issued by the State of Virginia, and all her tax-payers will be intimidated and deterred from buying from your orators and all others in the future any more of said coupons.

Your orators charge that — are very few, if any, tax-payers in Virginia whose taxes amount to a sum sufficient to justify them in making the contest with the State provided for in said act by appealing their cases to the Supreme Court of the United States, and thus your orators are absolutely deprived of the possibility of selling their coupons to any tax-payers whatever, unless to the insignificant number who might purchase with the intention of fighting out such a contest with said State.

Your orators are remediless in the premises save in a court of equity, where such matters are alone cognizable.

Your orators therefore pray that the said Morton Marye, auditor of Virginia, R. A. Ayers, the attorney general thereof, and the treasurer and Commonwealth's attorney of each county, city, and town in the State of Virginia may be made parties defendant hereto, and that they, their agents and attorneys, may be restrained and enjoined from bringing or commencing any suit provided for by said act of May 12th, 1887, or from doing any other act to put said statute into force and effect, and that until the hearing of a motion for said injunction a restraining order may be made to that effect.

That your orators may have all such other and general relief as the facts of their case may justify and to equity may seem meet. May the United States writ of subpœna issue; and your orator will ever pray, &c.

COMPLAINANTS,
By WM. L. ROYALL,
Their Solicitor.

7 STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

James P. Cooper, being first duly sworn, deposes and says that he is one of the complainants in the foregoing bill, and that the allegations thereof are true, as he verily believes.

JAMES P. COOPER.

Subscribed and sworn to before me this 6th day of June, 1887.
JOHN J. GRINDALL, *J. P.*

JAMES P. COOPER.

Sworn to and subscribed before me by James P. Cooper this 6th day of June, 1887, at the city of Baltimore, within the district of Maryland.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

A copy.
Teste: M. F. PLEASANTS, *Clerk.*

8 EXHIBIT A WITH BILL.

An act to provide for the recovery, by motion, of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered. (Approved May 12th, 1887.)

1. Be it enacted by the General Assembly of Virginia, That all taxes, including taxes on licenses, now due or which may hereafter become due to the Commonwealth, in payment of which any paper or instrument purporting to be a coupon detached from a bond of this State shall have been or may hereafter be tendered and not accepted as payment and not otherwise paid, may be recovered in the circuit court having jurisdiction over the county or corporation in which said taxes shall have been assessed, or if the tender was made to the auditor of public accounts in payment of taxes which he is authorized by law to receive the said taxes may be recovered in the circuit court of the city of Richmond.

2. The court shall have jurisdiction without regard to the amount of the taxes claimed and though the amount be less than twenty dollars.

3. The proceeding shall be by motion, in the name of the Commonwealth, on ten days' notice, and shall be instituted and prosecuted by the attorney for the Commonwealth or corporation in which the proceeding is, or if it be instituted by direction of the auditor of public accounts in the circuit court of the city of Richmond.

4. The notice may be served in any county or corporation in the State in the mode prescribed by the first section of chapter one hundred and sixty-four of the code (edition of eighteen hundred and seventy-three), or it may be served on any agent of the defendant in the county or corporation in which the proceeding is, and the word "agent," as here used, shall include any person who shall have made the tender aforesaid on behalf of the defendant, or if there be no known agent of the defendant in the said county or corporation it may be served by the publishing the same one time in some newspaper printed in the county or city where the tax was
9 assessed, or if there be no paper printed in such county or city, then in some newspaper published in some county or city nearest to the county or city where such tax was assessed.

5. The motion may be tried or heard by the court or jury as motions in other civil cases. If the defendant relies on a tender of coupons as payment of the taxes claimed he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered, and the clerk shall carefully preserve them. Upon such plea filed the burden of proving the tender and the genuiness of the coupons shall be on the defendant. If the tender and the genuiness of the coupons be established judgment shall be for the defendant on the plea of tender. In such case the clerk shall write the word "proved" and thereunder his name in his official character across the face of the coupons, and transmit

them, together with a certificate of the court that they have been proven in the case, to the auditor of public accounts, who shall deliver the coupons to the second auditor, receiving therefor the check of the second auditor upon the treasurer, which check he shall pay into the treasury to the credit of the proper tax account.

6. If the defendant fails in his defence and the taxes claimed are found to be due the State, any coupon filed by him with a plea of tender (and not spurious) shall be returned to him, and there shall be judgment for the Commonwealth for the aggregate amount of the taxes due and the interest thereon from the time they became due till the date of the judgment, with interest on the said aggregate amount from the date of the judgment until payment, and costs.

7. No antecedent lien of the Commonwealth for the taxes for which any judgment is rendered shall be deemed to be merged in the judgment or otherwise impaired by the recovery of the same, but such lien shall continue in force notwithstanding the judgment.

8. Every such judgment shall be docketed, as prescribed by law in other cases, and the clerk shall issue execution thereon, directed to the sheriff of any county (or sergeant of any city), who shall account for the money collected thereon to the auditor of public accounts.

9. Should coupons be tendered the officer in satisfaction of said execution, he shall note the fact of such tender upon the execution and return it to the clerk's office; and thereupon the auditor of public accounts may direct an action to be brought upon the judgment. This action shall be instituted and prosecuted in the mode herein prescribed for actions to recover judgments for taxes, and similar actions may be instituted whenever coupons are tendered in satisfaction of any judgment obtained by the Commonwealth under the provisions of this act.

10. The clerk of the court in which any such judgment is rendered in behalf of the Commonwealth shall, as soon as it is rendered, transmit a certified abstract thereof to the auditor of public accounts, who shall record the same in a book to be kept for that purpose.

11. Immediately after the passage of this act the county and city treasurers, and all other officers authorized by law to collect or receive money for taxes due the Commonwealth, including the license taxes, shall report to the Commonwealth's attorneys of their respective counties and cities, and also to the auditor of public accounts, the names of all persons assessed or liable therein for taxes due the Commonwealth who have heretofore tendered (otherwise than for identification and verification) coupons for such taxes, and which taxes remain unpaid, the amount of the taxes due, on what account, and when they become payable, and a description, as far as possible, of the coupons tendered, and when tendered; and they shall thereafter make like reports whenever and as soon as any such tender may be made. As soon as the auditor of public accounts shall receive such reports he shall credit the proper officer with the taxes named therein for which coupons were tendered.

12. The attorneys for the Commonwealth, and the attorney general, when it is his duty under this act to represent the Commonwealth in any case in the circuit court in the city of Richmond, upon such report being made to them, or whenever they are otherwise informed of any such tender having been made, shall forthwith institute and prosecute such proceedings as are hereinbefore required.

13. In any case instituted under the provisions of this act, in which there is a judgment for the Commonwealth, a fee of ten dollars shall be allowed the attorney for the Commonwealth, or the attorney general, as the case may be, which fee and fees of the clerk and other officers for services rendered in the case, as well as such other costs as are allowed by law in other cases in which the Commonwealth is a party, shall be taxed in the costs against the defendant. The Commonwealth shall not be liable for any fees or costs in any proceedings under this act.

11 14. If any officer fail to perform any duty required of him by this act he shall be fined not less than one hundred dollars nor more than five hundred dollars.

15. This act shall be in force from it passage.

A copy.

J. BELL BIGGER,
Clerk of the House of Delegates and Keeper of the Rolls of Virginia.

May 21, 1887.

A copy of the bill and exhibit.
Teste: M. F. PLEASANTS, *Clerk.*

46658.

12 And thereupon, upon the same day, to wit, the 6th day of June, 1887, the following order was entered, viz:

Circuit Court of the United States for the Eastern District of Virginia.

JAMES P. COOPER, H. R. BEETON, F. J. BURT, N. J. CHINNERY, W. M. CHINNERY, F. P. LEON, and W. G. WOOLSTON,
against
MORTON MARYE, Auditor, R. A. AYRES, Att'y General, the Treasurers of Counties, Cities, and Towns in Virginia, and the Commonwealth Attornies of Counties, Cities, and Towns in said State, whose names Complainants have leave to insert as they may be Discovered.

Upon reading the bill of the complainants, it is ordered that Morton Marye, auditor, R. A. Ayres, att'y general, each and every treasurer of a county, city, or town in the State of Virginia, and each and every Commonwealth attorney for a county, city, or town in said State, be restrained from bringing or commencing any suit against any person who has tendered the State of Virginia's tax-receivable coupons in payment of taxes due to said State, as provided for and

directed by the act of the Legislature of Virginia, approved May 12th, 1887, described in the bill, and of which a copy is at-
13 tached thereto, and that each and all of said parties, their agents and attorneys, be restrained from doing any act to put said statute into force and effect until the further order of the court.

And it is ordered that the motion for an injunction in this case be set down for hearing at the circuit court of the United States at Richmond, Virginia, on the first Monday in October next, provided that the attorney general of the State of Virginia or either of the defendants may move the court for an earlier hearing thereof after ten days' written notice to the solicitor of the complainants; and provided further, that a copy of this bill and of this order be served on the attorney general of the State of Virginia within ten days after the filing thereof.

June 6th, 1887.

HUGH L. BOND,
Circuit Judge.

Marshal's Return.

Executed this 7 day of June, 1887, by delivering to R. A. Ayres, attorney general, the within-named defendant, in person a true copy of this writ; also a true copy of the bill.

A. A. CHAPMAN,
Special Deputy Marshal.

14 And at another day, to wit, on the 11th day of July, A. D. 1887, the following order was entered:

JAMES P. COOPER
vs.
MORTON MARYE, Auditor, &c., *et als.* } In Equity.

Upon reading the affidavit of S. Bolyn, bearing date July 6th, 1887, to be filed as of this date, it is ordered that J. L. McIntosh, treasurer of Loudoun county, Virginia, and J. B. McCabe, Commonwealth's attorney for said county, do appear at the court-room of the U. S. circuit court, at Richmond, Virginia, at 12 m., on the 28th instant, and show cause, if any they or either of them can, why they and each of them should not be attached for their alleged contempt in disregarding the restraining order heretofore granted in this cause; but a copy of this order shall be served upon the said McIntosh and McCabe not less than ten days before the said 28th inst.

HUGH L. BOND, *C't Judge.*

Marshal's Return.

Executed 14 day of July, 1887, by delivering to J. B. McCabe, Commonwealth's attorney for Loudoun county, in person, a true copy of this order, and by delivering to Mrs. J. L. McIntosh, for J. L. McIntosh, treasurer of Loudoun county, she being a member of the family and over sixteen years of age, and having explained to her the purport of same.

JNO. H. OVERBEY,
Spec. Deputy U. S. Marshal.

The affidavit of S. Bolyn, referred to in the foregoing order, is as follows:

LOUDOUN COUNTY, *to wit:*

15 Before me, W. B. Wilmarth, a notary public for and within the county of Loudoun, State of Virginia, personally appeared S. Bolyn, who made oath that as agent for and in behalf of certain citizens and tax-payers of the county and State aforesaid, whose names are herein below specified, he did, between the 1st day of Nov., 1886, and April 1st, 1887, tender to Jas. L. McIntosh, treasurer of said county, in said State, in payment of taxes for the year 1886, assessed against said parties in favor of the Commonwealth of Virginia, certain coupons known as tax-receivable coupons, purporting to be cut off of certain bonds of the Commonwealth of Virginia, issued under acts of Legislature of Virginia in 1871 and 1879, and which coupons, on their face and by operation of law, are and were receivable for all taxes, dues, and demands in favor of or due to the Commonwealth of Virginia; all said coupons were, at the date of said tender, past due, and said treasurer refused to accept the coupons and cost so tendered in payment of said taxes, although the exact amount thereof, and did not so refuse because of any claim or pretense that any of them were not genuine.

And further, that said coupons and costs were so tendered in behalf of said parties separately and apart, not jointly, whose names are herewith given, viz:

16 N. B. Peacock, Susan Gregg, W. H. Brown, Jr., Wm. H. Brown, Joshua Hatcher, W. T. Shumaker, W. H. Taylor, Edith Shumaker, W. Hoge, S. T. Pancoast's heirs, T. E. Taylor, Hannah Taylor, John Emerick, Samuel Crockett, Wm. F. Mercier, C. Paxson, Sam'l Davis, Enoch Fenton, I. & B. Piggott, John & W. Gregg, Wm. Gregg, S. N. Brown, Thos. R. Smith, W. Piggott, John Piggott, Sam'l D. Leslie, John Arnold, I. C. Hoge, Eli J. Nichols, Jonathan Mathews, Henry Saunders, T. S. Titus, G. C. Dulin, Geo. W. Titus, C. W. Fadeg, Jesse Hoge, Sam'l Brown, Chas. Nichols, Geo. W. Holmes, L. M. Holmes, Isaac Nichols, W. Henry Brown, Isaac Brown, Thomas Piggott, C. F. Otley, Joseph H. Pancoast, G. G. Craven, G. G. Craven, com'tee, Elizabeth Janney, Israel Warner, J. W. Garrett, H. R. Holmes, H. R. Holmes, ex'or of Pusey, W. T. Lemmon, Jas. Hoge's est., Jas. H. Cross, Hirst & Smith, Isaac Wilson, W. H. Wilson, F. P. Wilson, Eli J. Hoge, H. C. Gist & C., R. Paxson; and said Bolyn further made affidavit that said Jas. L. McIntosh, treasurer as aforesaid, did, on or about June 30th, 1887, and July 1st & 2d, 1887, as he is informed by J. B. McCabe, attorney for the Commonwealth for said county, make up a certain report or reports in his, said McIntosh's, handwriting, in form and substance such as is contemplated and required by sec. 11 of the act of Legislature of Virginia, approved May 12, 1887, known as "An act to provide for the recovery by motion of taxes," &c., and hand said reports to said McCabe, wherein the above-named parties are set down

17 the taxes with which for the year 1886 the- were assessed, &c., &c. Said Bolyn further made affidavit that the term of office of J. W. Foster, att'y for the Commonwealth for Loudoun county, expired July 1st, 1887, and that the term of office of J. B. McCabe, att'y for the Commonwealth for said county elect, began on July 1st, 1887, and that as such attorney for said county he, said McCabe, gave notice he would, under the provisions of said act of May 12, 1887, move the circuit court of Loudoun, at its next Octo. term, for a judgment, in the name and favor of said Commonwealth of Virginia, against said several parties above named for the said taxes with which they were assessed for the year 1886, & and for which, long prior to May 12, 1887, they tendered the coupons and cash aforesaid in payment; said notices bear date July 1, 1887, were made up, as he is informed, from the reports of said McIntosh, treasurer, furnished on, before, or after July 1, 1887, and said notices have since, as said affiant has been informed, been served upon said several tax-payers above named, all of whom hold the written promise and guaranty of Jas. P. Cooper, from whom said coupons were purchased, in form hereto attached, specifying the amount thereof, &c.

Affiant further made affidavit that said J. B. McCabe stated to him on July 5th, 1887, that he, said McCabe, knew before he caused said notices to issue against said several tax-payers that there was

18 a suit pending in circuit court of U. S. for eastern district of Va., wherein said Cooper is complainant, and an order had been made restraining and enjoining said McIntosh, treasurer, and J. W. Foster, attorney for the Commonwealth for Loudoun county, from proceeding under act of May 12, 1887, until further order of court, &c., which had been served on them.

Given under my hand this 6th day of July, 1887.

W. B. WALMARTH,
Notary Public.

The notice referred to in and filed with the foregoing affidavit is as follows, to wit:

Notice.

JULY 1ST, 1887.

John Herst and John Smith, composing the firm of Mess. Hurst & Smith:

You are hereby notified that on the first day of the next term of the circuit court for the county of Loudoun motion will be made in the name of the Commonwealth of Virginia to said court for judgment against you in favor of said Commonwealth for the sum of ($45) forty-five dollars, with interest thereon as the law directs, the said sum of $45 being the amount of taxes assessed against you in the county of Loudoun, due by you to said Commonwealth

19 for the year 1886, in payment of which there was tendered to the treasurer certain paper or instrument or papers or instruments purporting to be coupon or coupons detached from a bond or bonds of said State, and not accepted as payment and not otherwise paid.

Done by virtue of an act of the General Assembly of Virginia approved May 12th, 1887.

J. B. McCABE,
Attorney for the Commonwealth.

The guaranty of James P. Cooper referred to in and filed with the foregoing affidavit is as follows:

Whereas Herst & Smith, of Loudoun, has purchased from James P. Cooper $45 of Virginia tax-receivable coupons, now, therefore, if the said Herst & Smith shall tender said coupons for his State taxes the said James P. Cooper hereby covenants and he is authorized by the Virginia committee of the corporation of foreign bondholders of London so to covenant that if the said Herst & Smith *is* molested in any way by the officers of the State of Virginia he, the said James P. Cooper will furnish the said Herst & Smith with all necessary counsel and will save *him* harmless on account of said tender.

Witness my hand and seal this 31 day of Nov., 1886.

911 Main street, Richmond, Va., ——, 188–.

JAMES P. COOPER. [SEAL.]

Witness:
WM. L. ROYALL.

20 *Answer of J. B. McCabe to Rule Against Him to Show Cause, &c. Filed July 28th, 1887.*

The answer of J. B. McCabe, Commonwealth's attorney for Loudoun county, Virginia, to a rule issued against him on the 11th day of July, 1887, to show cause why he should not be attached for contempt, &c.

To Hon. Hugh L. Bond, judge of the U. S. circuit court, &c.:

Respondent, reserving all just rights to exceptions to said rule, for answer thereunto says that at the time he committed the alleged contempt—

I. He had no legal nor official notice that there was pending such a suit as "Jas. P. Cooper *et als. vs.* Morton Marye, aud'r, *et als.*"

II. He had no legal nor official notice that any injunction had been issued by your honor restraining any officer of the Commonwealth of Virginia from proceeding to enforce the law passed by the General Assembly of Virg'a, approved May 12th, 1887, entitled "An act to provide for the recovery by motion of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered."

21 III. Respondent had no legal nor official knowledge of the above-alleged facts.

IV. He had no legal nor official notice that his predecessor in office, Capt. J. W. Foster, had been served with restraining order in said suit; but respondent insists that a service upon Capt. Foster is not a service upon respondent; and even if respondent had notice

by his predecessor, the said Foster, showing him (which was not done) the restraining order served upon him—if one, indeed, was served—yet such notice would not make respondent party to the suit. This suit is either a suit against the State of Virginia or against individuals. If against the State, then void by XI amendment to the Constitution of the United States. If against individuals, then the individuals must be made parties by service of process. As said by Chief Baron Comyns, Com. Dig., Chancery D. 8, "No one shall be restrained by injunction if he is not warned." Respondent to this day has not been "warned." He was never served with process, and service upon Capt. Foster or any other man is not service upon respondent. J. W. Foster is a different "individual" from respondent, nor is he the attorney for the respondent. There is in the county of Loudoun no office for the occupancy of the
22 "Commonwealth's attorney. J. W. Foster occupied one building; respondent occupies a different building. There are no records kept by said officer; none were turned over to respondent upon his qualification nor since by said Foster, and accordingly there could be brought home to respondent no knowledge nor notice of process, except by service of the process or the handing of the same to him by said Foster, neither of which was done. Therefore respondent insists he is in no contempt to this court and should be discharged.

But, for further answer, if the above is not sufficient, first premising his statement that no contempt to your honor or to your honor's court was intended by respondent, and that he was not aware that any act of his could be so construed, says:

V. On the 26th day of May, 1887, by the qualified voters of Loudoun county, in Virginia, respondent was duly elected Commonwealth's attorney, and on the 13th day of June, 1877, in the
23 county court of said county he qualified and gave bond as the law directs, and on the 1st day of July, 1887, entered upon the discharge of the duties of his office.

Respondent avers that it was his duty and he was bound by his bond to the Commonwealth of Va. and by his oath of office to try to enforce all the laws passed by said Commonwealth. Among these laws respondent found the following. (Here insert said act of General Assembly of Va., approved May 12th, 1887.)

This act, under the penalty of not less than $100 nor more than $500, made it encumbent on respondent to give notice of certain suits. This he did, but he did it not in his own name but in the name of the "Commonwealth of Va.," under direct written instructions. He was acting as attorney for his client, and his client was the State, and a suit that stops him, stays him, from this is inevitably stopping the State itself. In such a case as this, differing, respondent would respectfully suggest, from any that has heretofore arisen, as Justice Bradley, in "Poindexter *vs.* Greenhow," U. S. Supr. Court, said, "The whole object is to coerce the State. To say otherwise is to talk only for effect."

24 But the State cannot be sued. This all acknowledge, except, possibly, Judge Hughes, in "Norfolk Trust Co. *vs.* Marye,"

where he seems to hold that a citizen of Va. may sue the State, though no other person can; but, to the contrary, see the 4 dissenting justices of the Supreme Court in "Poindexter *vs.* Greenhow."

But, further, the Revised Stats. of U. S., § 720, says: "The writ of injunction shall not be granted by any court of the U. S. to stay proceedings in any court of a State."

This statute "prohibits the Federal courts from enjoining a suit in a State court, because of the unconstitutionality of a State statute upon which that suit is founded. The proper remedy is by a writ of error." 2d circuit U. S. (Verm't), 1883 ("Ransealear & Saratoga R. R. Co. *vs.* Bennington & Rutland R. R. Co.), 18 Fed. Rep'ts, 617; Abbott's Nat. D., p. 700, and by Revised Stats., § 3224, formerly act of May 27th, 1872.

"No suit for the purpose of restraining the assessment or
25 collection of any tax shall be maintained in any court." This prohibition "includes a suit to restrain the collection of any sum by authority of the U. S. having the form and color of a tax by any means authorized by law for the collection of taxes."

9th circ., U. S. (Calif'a), 1868, Howland *v.* Soule Deady, 413 (as N. D., 710).

A fortiori to restrain the collection of any sum by authority of a sovereign State. In "Mead *vs.* Merritt," 2 page R., 404, Mr. Chancellor Walworth, after acknowledging the principle that the "State courts cannot enjoin proceedings in the United States courts nor the latter in the former courts," said "not only county but public policy forbade the exercise of such a power."

Respondent is aware that there have been decisions from "Osborn *vs.* Bank of the U. S.," 9 Wheaton, 738, down to "Davis *vs.* Gray," 16 Wallace, 203, in which the above principles have been explained or in which the courts have held there were certain exceptions or cases not applicable to above laws; but respondent would call attention to the fact that said Revised Stat., § 3224, was enacted after nearly all of said decisions upon which the U. S. courts have claimed
26 jurisdiction were rendered.

But, as was said of this last-mentioned decision of "Davis *v.* Gray" by the Supreme Court of the U. S. in "Cunningham *vs.* Macon & Brunswick R. R. Co.," 109 U. S., 446, "the case goes to the verge of sound doctrine, if not beyond it, and the principle should be extended no further."

But this case of "Jas. P. Cooper *et als. vs.* Marye, auditor, &c.," respondent would respectfully say, goes "a bow-shot" beyond any of them. Here a "non-resident and an alien," with whom the State has made no contract, for he is not a tax-payer ("Marye *v.* Parsons," Supreme C't of U. S.), at one "great swoop" takes in "each and every treasurer and Commonwealth's attorney of every county, city, and town in the State, the auditor of public accounts, and the attorney general of Virginia"—not indeed by name, except two, but, as "complainants" may discover, they "have leave to insist," thereby allowing complainants, though "a preliminary injunction is always an extraordinary exercise of judicial powers" (American Nicolson Pavm't Co. *vs.* Elizabeth, 3rd U. S. Circuit (N. J.), 4 Fish

Pat. Cas., 189), and, though "an injunction will not be granted if there is a reasonable doubt of the validity of the law,
27 nor of the proper exercise of the power it confers, &c." (same circuit, "Bonaparte *v.* Camden & Amboy R. R. Co.," Baldw., 205), to summons, and so gather, at their option, the treasurers and those that Virginia has selected to prosecute the criminals "against her peace and dignity," from their homes and from the protection of her rights to answer the complaints of these non-resident and non-tax-payers in a case of "*damnum absque injuria*," in a case "to determine questions of law *in thesi*." (Mr. Justice Mathews, in Marye *vs.* Parsons.)

Complainants have "no rights under a contract effected by this legislation." Virginia has never contracted that they should "deal in coupons" and make a profit therefrom by selling to *bona fide* tax-payers (unless they take out a license therefor, which respondent is informed and so charges they have not done), but even their "rights to pay their taxes in coupons and the immunity from further proceedings in case of rejected tender are not rights directly secured to them by the Constitution, and only indirectly, as they happen in this case to be rights of contract which they hold
28 under the laws of Virginia." Sup. Court of U. S., "Carter *vs.* Greenhow," on appeal from this court.

The contract under which complainants will lose is a contract with certain tax-payers, not a contract with Virginia, and accordingly no constitutional provision such as was claimed for plaintiff in "Carter *v.* Greenhow" is or can be denied to plaintiffs by this legislation. As was said in that case of "Carter *v.* Greenhow," "The mode in which Congress has legislated in aid of rights secured by that clause of the Constitution is, as is pointed out in the Civil Rights Cases, 109 U. S., 3–12, by providing for a review on a writ of error to the judgments of the State courts and by conferring jurisdiction upon the circuit courts of all cases where the sum or value exceeds $500. By act of Congress approved March 3d, 1887, amending this act it is made now $2,000 instead of $500. Congress has provided no other remedy for the enforcement of this right."

And in the case of "Pleasants *vs.* Greenhow" the U. S. Supreme C't upon a petition for an injunction by a citizen and tax-payer of Va., held that this court had no jurisdiction to restrain by
29 injunction the collection of the tax.

Therefore respondent insists that this court had no jurisdiction; that its acts in granting the preliminary injunction were without authority of law and are null and void; and "unless the court had jurisdiction of the case the disobedience of an injunction order made therein will not be punishable as for contempt." 6th circ. U. S. (Mich.), 1878, Evans *v.* Peck, 7 Rep'ts, 70.

Having fully answered, respondent prays to be hence dismissed with his costs about this rule so unjustly expended.

J. B. McCABE.

Subscribed & sworn to before me this 28th day of July, 1887.
M. F. PLEASANTS, *Clerk.*

30 And at another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 28th day of July, 1887:

JAMES P. COOPER *et al.*
v.
MORTON MARYE, Auditor, &c., *et als.* } In Equity. 432.

Upon motion of the complainants leave is given them to file an amended bill, which is accordingly done, and the motion for an injunction in this cause is to be heard upon the bill and the amended bill.

HUGH L. BOND,
Circuit Judge.

The amended bill referred to in the above order is in the words and figures following, to wit:

31 *Amended Bill.*

Circuit Court of the United States for the Eastern District of Virginia.

JAMES P. COOPER & *als. vs.* MORTON MARYE & *als.*

To the honorable judges thereof:

Complaining, showeth unto your honors your orators, James P. Cooper, H. R. Beeton, F. J. Burt, H. T. Chinnery, W. M. Chinnery, F. P. Leon, and W. G. Woolston, who sue for themselves as well as for all others in like situation who will come in and share the expenses of this suit, that they are citizens of the Kingdom of Great Britain and subjects of Her Majesty Victoria, queen thereof; that by an act of her General Assembly approved March 30th, 1871, the State of Virginia provided for the issuing of a large number of her bonds, to bear interest coupons, which she thereby contracted should be received in payment of all taxes, debts, and demands due to her, and her proper officers did issue thereafter many millions of dollars of said bonds.

That by another act of her General Assembly, approved March 28th, 1879, she provided for issuing another series of her bonds, with like interest coupons attached thereto, and her proper officers did thereafter issue many millions of dollars of her bonds, as provided by said act, with said coupons attached thereto.

That said coupons, issued under both of said acts, are payable to the bearers, and both as a contract to pay interest and as a contract that they shall be received in payment of taxes they are negotiable instruments for all time, free in the hands of any *bona fide*
32 purchaser for value from any equity or burden whatever; that there are at this time overdue and outstanding in the hands

of the public at large more than $4,000,000 of these overdue coupons; that from the time said State issued said coupons and placed them upon the markets of the world her Legislature has been industriously seeking to destroy the same and make them of no value, and all the legislation hereinafter referred to is part of one scheme and plan to destroy the same and make them of no value; that by the 15th section of an act of her General Assembly, approved February 14th, 1882, all her officers are forbidden to pay and redeem the same according to the tenor of her contract as promises to pay interest on her said bonds; that by an act of her General Assembly, approved January 26th, 1882, the collectors of her taxes are forbidden to receive the same in payment of any taxes due to her; that after the enacting of both these statutes, to wit, in the month of ——, 1885, the Supreme Court of the United States decided, in the case of Poindexter *vs.* Greenhow, that a tender of said coupons by a tax-payer to the said State's collector of taxes paid and extinguished said tax due to her so as to deprive her Legislature of power to cause that tax-payer to be thereafter molested in respect to said tax.

That while her Legislature had made said coupons, by the two acts above mentioned, valueless as claims upon said State for money, or as mediums by which taxes due to her might be paid and extinguised in the popular sense of those words, yet this decision of the Supreme Court attached to them an important value as tender in payment of taxes, whereby the tax-payer would become possessed of a shield and barrier between himself and said State, whereby he could prevent her from demanding of him anything else in payment of his taxes as aforesaid; that when said court made the decision aforesaid the market value of said coupons was very greatly depressed, the same being less than fifty cents on the dollar; but said decision gave a certain intrinsic value to said coupons, which justified reasonable men in believing that the market value thereof would greatly enhance; that acting on their faith in the said decision of said court, and the belief caused thereby, that the said State would be utterly unable, by any legislative enactment, to impair the value of said coupons as tenders for taxes, your orators bought a large quantity of said coupons in the open money market of the city of London and elsewhere, the same amounting to more than $100,000, at less than fifty cents on the dollar, the whole costing more than $30,000, and the interest of each of your orators
33 in said coupons so purchased is joint and not several. Your orators believed, and were justified in believing, that they would be able to sell said coupons to said tax-payers at a considerable advance over and above the price paid by them by reason of the quality imparted to them by said decision of valid tenders in payment of taxes.

That your orators made this purchase for the purpose of selling said coupons to the tax-payers of Virginia, to be used by them as tenders for taxes due said State, many of which they have sold to said tax-payers to the amount of $50,000 for $15,000 or more, and that said tax-payers have tendered the same to the proper State officers in payment of their taxes due to said State, and that said

officers refused to receive the same in payment of said taxes. Your orators do not own and have no means of controlling the bonds from which the coupons purchased by them were cut.

That whilst said acts above mentioned forbidding payment of said coupons in money and forbidding the receipt of them for taxes were in force the Legislature of Virginia enacted another statute which was approved on the 12th day of May, 1887, a copy of which is hereto attached, marked A, whereby the treasurer of each county, city, and town in the State is ordered to furnish to the Commonwealth's attorney thereof a list of all persons who have tendered the said State's coupons in payment of their taxes, and said Commonwealth's attorneys are ordered to institute suits by summary proceedings in the name of said State against all such persons to recover a judgment against them for the amount of said taxes so previously due by them.

That the said tax-payers are thereby required to submit to a judgment against them by default or to appear in court and plead a tender of said coupons and then prove affirmatively that the coupons tendered by them are the State's coupons and not counterfeit and spurious coupons, the burden of proving the same being placed upon the tax-payer and the coupon being taken to be *prima facie* spurious and counterfeit.

That said act is repugnant to section ten of article one of the Constitution of the United States for the reason that, taken in connection with said act before mentioned of January 26th, 1882, it first commands the State's officers to refuse to receive those coupons which are undoubtedly her own as well as those which are spurious (and your orators charge that there are none such), and then commands her officers to bring said suits against those who have tendered said coupons of said State as well as against those who have tendered spurious coupons; that it imposes upon the de-
34 fendants heavy costs and fees, although all taxes due by them were paid by said tender, and it makes the judgment to be recovered in said suit a perpetual lien upon all the property of said tax-payer for said taxes, and for said costs and fees also, thus fixing a perpetual cloud upon the title of said tax-payer to his property.

That by another act of the General Assembly of said State, approved January 26th, 1886, it is provided that upon a trial of the issue to be made up under said act of March 12th, 1887, the defendant shall produce the bond from which the coupon so tendered by him was cut and prove that it was cut from said bond. Your orators charge that very few of said bonds are owned by persons residing in Virginia, and in ninety-nine per cent. of the cases the Virginia tax-payers would be utterly unable to produce said bonds; that by another act of said General Assembly, approved January 21st, 1886, it is provided that the tax-payer undertaking to prove said tender shall not be allowed to introduce expert evidence to prove the genuineness of said coupons, and all that have been issued under either of said acts are engraved only as said acts provided they may be and are not signed manually.

Therefore said tax-payers who cannot produce said bonds will be

utterly unable to prove their coupons to be genuine upon said trial, the State thus forcing them into a lawsuit in her own courts, in which she has taken effectual precautions beforehand to make it impossible they can win, and to make it a legal certainty that they must lose when they cannot produce said bonds; that said act is a device and a trick enacted to take away from and deprive said coupons of their value as tender for taxes.

That the great bulk of Virginia's tax-payers pay small sums, and if her officers are allowed to enforce said act of May 12th, 1887, against them the profit to be derived from purchasing your orators' coupons will be too small to induce them to do so, and, indeed, it will be impossible for them to use said coupons at all, except in the very limited cases in which they can produce said bonds.

That the supreme court of appeals of the State of Virginia has decided, in the winter of 1886–'7, that said acts requiring said bonds to be produced and forbidding the use of expert testimony are valid acts and not repugnant to the Constitution of the United States; that therefore, if the officers of said State are permitted to enforce said act of May 12th, 1887, your orators will not only lose the profit which they had a right to expect they would make when they purchased said coupons, but they will be unable to sell them to
35 Virginia's tax-payers at any price, and thus their entire property in the same will be destroyed; and your orators charge and aver that in any event, unless they are granted the injunction hereinafter prayed for, they will lose a sum greater than $2,000. Your orators charge that if said act of May 12th, 1887, is enforced the reclamations made upon them and which they will have to pay will amount to more than $2,000, and if it is enforced they will be unable to sell any more of said coupons so purchased by them, and the loss they will thus sustain will be far more than $2,000, exclusive of costs and interest.

Your orators would show further that there are in the State of Virginia about one hundred counties, cities, and towns, and that there is a treasurer and Commonwealth's attorney for each, but they have been compelled to present this bill so hastily that they have not yet been able to ascertain the name of each, which names they pray they may be allowed to insert in this bill when they ascertain them. They are informed and believe and so charge that the treasurer of each county, city, and town in said State is about to report to each Commonwealth's attorney the name of every tax-payer who has tendered coupons, and each Commonwealth's attorney is going at once to institute the suits provided for by said act of May 12th, 1887, against persons holding coupons bought from your orators, as well as against all others; and they are informed and believe and so charge that in every case in which tenders of coupons have been made to the auditor of the State, who is Morton Marye (and many have been made to him), the said auditor and Hon. R. A. Ayers, who is attorney general thereof, are about to institute the suits which said act provides for their instituting, whereby all coupons which your orators have sold to Virginia tax-payers will be condemned as spurious, although they are all genuine coupons issued by the State

of Virginia, and all her tax-payers will be intimidated and deterred from buying from your orators and all others in the future any more of said coupons.

Your orators charge that there are very few, if any, tax-payers in Virginia whose taxes amount to a sum sufficient to justify them in making the contest with the State provided for in said act by appealing their cases to the Supreme Court of the United States, and thus your orators are absolutely deprived of the possibility of selling their coupons to any tax-payers whatever unless to the insignificant number who might purchase with the intention of fighting out such a contest with said State; and your orators further show that acts of the General Assembly of the State of Virginia, which
36 are repugnant to section 10 of article I of the Constitution of the United States, commanded the treasurer of each county to levy on and sell the property of each tax-payer who has tendered coupons in payment of his taxes; and said acts also command said treasurers to return the real property of such tax-payers delinquent where no personal property can be found to be seized and sold; and your orators charge, therefore, that where said officers are enjoined from bringing said suits hereinbefore described the treasurer of each county will proceed to execute said other unconstitutional acts by levying on such tax-payer's property, or by returning the same delinquent where no personal property can be found, thus creating a cloud upon the title of such tax-payer's property.

Your orators are remediless in the premises save in a court of equity, where such matters are alone cognizable.

Your orators therefore pray that the said Morton Marye, auditor of Virginia, R. A. Ayers, the attorney general thereof, and the treasurer and Commonwealth's attorney of each county, city, and town in the State of Virginia, all of whom are citizens of Virginia, may be made parties defendant hereto, and that they, their agents and attorneys, may be restrained and enjoined from bringing or commencing any suit provided for by said act of May 12th, 1887, or from doing any other act to put said statute into force and effect, or from levying on or returning delinquent any person who has tendered coupons in payment of his taxes, and that until the hearing of a motion for said injunction a restraining order may be made to that effect.

That your orators may have all such other and general relief as the facts of their case may justify and to equity may seem meet. May the United States writ of subpœna issue; and your orators will ever pray, &c.

COMPLAINANTS,
By WM. M. ROYALL,
Their Solicitor.

47630

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

James P. Cooper, being first duly sworn, deposes and says that the allegations of the foregoing bill are true to the best of his knowledge and belief.

JAMES P. COOPER.

Subscribed and sworn to before me this 28th day of July, 1887.
A. B. GUIGON, *N. P.*

The Exhibit A referred to in the foregoing bill, being the same as that attached to the original, is omitted here.

37 And on the same day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 28th of July, 1887:

JAMES P. COOPER *et al.*
v.
MORTON MARYE, Auditor, &c., *et als.* } In Equity.

&

In re J. B. McCABE and J. L. McINTOSH. } Proceeding for contempt.

These causes having been set for hearing on this day, leave is given for complainants to amend their bill of complaint, and the hearing is postponed for reasons satisfactory to the court and counsel until the 22nd day of September next, it being understood by the court that nothing further shall be done in respect to questions at issue till the hearing, but that all proceedings shall remain *in statu quo;* and J. B. McCabe and J. L. McIntosh having filed their answers to the rule heretofore awarded against, the proceeding against them is likewise postponed to September 22nd, 1887.

HUGH L. BOND,
Circuit Judge.

38 And at another day, to wit, on the 23d day of August, 1887, the following order was entered:

Upon reading the affidavit of Wm. L. Royall, hereto attached and to be filed by the clerk, together with the exhibits therewith. it is ordered that John Scott, Esq., attorney for the Commonwealth for Fauquier county, State of Virginia, shew cause before me, at the court-house in Richmond, in said State, on the 22d day of September, 1887, at eleven o'clock a. m. of that day, why he shall not be attached for his alleged contempt in violating the restraining order made in this cause on the 6th day of June, 1887, and that a copy of this order, August 23d, 1887, be served on said defendants on or before the 1st day of Sept., 1887.

HUGH L. BOND, *C't Judge.*

The foregoing order is endorsed as follows, viz:
Executed Aug. 31, '87, by delivering to John Scott, Commonwealth's attorney of Fauquier county, Virginia, a true copy of this order. Jno. H. Overberg, spec. deputy U. S. marshal.

The affidavit of Wm. L. Royall and the exhibits filed there-
39 with, referred to in the foregoing order, are in the words and figures following, viz:

Circuit Court of the United States for the Eastern District of Virginia.

JAMES P. COOPER, H. R. BEETON, *et al.*

v.

MORTON MARYE, Auditor, &c., R. A. AYERS, Atto. Gen'l, &c., *et als.*

Wm. L. Royall, being first duly sworn, deposes and says that he is solicitor for the complainants in the above-entitled cause; that Mrs. M. C. Stribling and C. E. Strother are residents of the county of Fauquier, in the State of Virginia; that they tendered to the treasurer of Fauquier county, in payment of taxes due by them to the State of Virginia for the year 1886, coupons cut from bonds issued by said State, which coupons bore the contract of said State that they should be received in payment of all taxes due to her; that John Scott is the attorney for the Commonwealth for Fauquier county, and that it appears by a certified copy of the restraining order made in this cause, hereto attached, that the said Scott was duly served with a copy of the same on the eleventh day of June, 1887.

Affiant attaches hereto a letter which he has received from Mrs. M. C. Stribling and a notice addressed to her by said Scott, and also a letter received by him from C. E. Strother, together with a
40 notice addressed by said Scott to him, from which it appears that both have been sued by said Scott under the act of the Virginia Legislature, approved May 12th, 1887, in violation of said restraining order.

Affiant has also received the letters, hereto attached, from J. S. Payne and Edw'd P. Turner, which show that the said Scott has violated the said order by suing each of them.

WM. L. ROYALL.

Subscribed and sworn to before me this 20th day of August, 1887.

JACKSON BRANDT, *N. P.*

The exhibits filed with foregoing affidavit are as follows, viz:

MARKHAM STA., *Aug.* 17*th*, 1887.

Mr. Wm. L. Royall:

I enclose you notice received to-day from Warrenton, as you promised me when I purchased coupons of you last fall "to hold me harmless & provide me legal protection, in case I was in any way molested, free of all cost."

Now, Mr. Royall, I don't know what to do; so write to you & hope you will have all made right for me.

41 With the hope of hearing from you very quickly,

Yours most respectfully, M. C. STRIBLING.

Notice.

To Mrs. M. C. Stribling:

You are hereby notified that I shall, in the name and on behalf of the Commonwealth of Virginia, move the circuit court of Fauquier county, on the 6 day of September, 1887, for judgment against you for the sum of one hundred and twenty-two dollars and nineteen cents, with legal interest thereon from the 1 day of December, 1886, being amount of taxes due by you to the said Commonwealth for the year 1886 still remaining unpaid, and for the payment of which (otherwise than for identification and verification) papers purporting to be genuine coupons of the Commonwealth have been tendered.

See act of Assembly of Virginia, approved May 12, 1887, entitled "An act to provide for the recovery, by motion, of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered."

JOHN SCOTT,
Commonwealth's Attorney.

42 MARKHAM, VA., *Aug.* 18*th*, 1887.

Wm. L. Royall, Esq.

DEAR SIR: Please examine the enclosed notice by Commonwealth's attorney of this county upon me, & write me what it amounts to & what I should do in the matter. Please answer fully & explicitly. Is it necessary I should attend that term of the court? By replying at once you will greatly oblige

Y'rs truly, C. EDW'D STROTHER.

Notice.

To G. T. & C. E. Strother:

You are hereby notified that I shall, in the name and on behalf of the Commonwealth of Virginia, move the circuit court of Fauquier county, on the 6 day of September, 1887, for judgment against you for the sum of sixty-three dollars and ninety cents, with legal interest thereon from the 1st day of December, 1886, being amount of taxes due by you to the said Commonwealth for the year 1886 still remaining unpaid, and for the payment of which (otherwise than for identification and verification) papers purporting to be genuine coupons of the Commonwealth have been tendered.

See act of Assembly of Virginia, approved May 12, 1887, entitled
"An act to provide for the recovery, by motion, of taxes and
43 certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered."

JOHN SCOTT,
Commonwealth's Attorney.

WARRENTON, VA., *Aug.* 18*th*, 1887.

MY DEAR MR. ROYALL: I send you notice of the Commonwealth's atto. that he will move for judgment against Mr. Harrison, who tendered coupons under Mr. Cooper's guarantee.

I got the impression that there was a truce until the contempt cases shall have been disposed of. If my impression be correct, is not this suit a violation of that truce?

I presume you will have the treasurer and Commonwealth's atto. brought before Judge Bond for contempt.

Very truly yours, J. S. PAYNE.

Notice.

To C. K. Harrison:

You are hereby notified that I shall, in the name and on behalf of the Commonwealth of Virginia, move the circuit court of Fauquier county on the 6 day of September, 1887, for judgment against
44 you for the sum of two hundred and forty-four dollars and thirty-one cents, with legal interest thereon from the 1 day of December, 1886, being amount of taxes due by you to the said Commonwealth for the year 1886 still remaining unpaid and for the payment of which (otherwise than for identification and verification) papers purporting to be genuine coupons of the Commonwealth have been tendered.

See act of Assembly of Virginia, approved May 12, 1887, entitled "An act to provide for the recovery, by motion, of taxes and certain debts due the Commonwealth for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered."

JOHN SCOTT,
Commonwealth's Attorney.

THE PLAINS, FAUQ'R CO., VA., 20*th Aug.*, 1887.

DEAR SIR: I have just rec'd notification from our county circuit that suit will be instituted against me for the amount of taxes due the State, which I offered in coupons this spring. The circuit court will hold its session on the 6 prox. I write you for instructions in my case. Will it be necessary for me to attend the court in Warrenton on the 6th, and what steps shall I take?

Very resp'y, EDW'D P. TURNER.

45 Circuit Court of the United States for the Eastern District of Va. In Equity.

JAMES P. COOPER, H. R. BEETON, F. J. BURT, H. J. CHINNERY, W. M. CHINNERY, F. P. LEON, and W. G. WOOLSTON

vs.

MORTON MARYE, Auditor, R. A. AYERS, Attorney General, the Treasurers of Counties, Cities, and Towns in Virginia, and the Commonwealth Attorneys of Counties, Cities, and Towns in said State whose Names Complainants have Leave to Insert as they may be Discovered.

Upon reading the bill of the complainants, it is ordered that Morton Marye, auditor; R. A. Ayers, attorney general, each and every treasurer of a county, city, or town in the State of Virginia, and each and every Commonwealth attorney for a county, city, or town in said State be restrained from bringing or commencing any suit against any person who has tendered the State of Virginia's tax-receivable coupons in payment of taxes due to said State as provided for and directed by the act of the Legislature of Virginia approved May 12th, 1887, described in the bill, and of which a copy is attached thereto; and that each and all of said parties, their agents and attorneys, be restrained from doing any act to put said statute into force and effect until the further order of the court; and it is ordered that the motion for an injunction in this case be set down for hearing at the circuit court of the United States at Richmond, Virginia, on the first Monday in October next, provided that the attorney general of the State of Virginia or either of the defendants may move the court for an earlier hearing thereof after ten days' written notice to the solicitor of the complainants; and provided that a copy of this bill and of this order be served on the attorney general of the State of Virginia within ten days after the filing thereof.

June 6, 1887.

HUGH L. BOND, *C't Judge.*

A true copy.
Teste: ——— ———.

The foregoing exhibit is endorsed as follows, viz:

Executed this 11th day of June, 1887, by delivering to John Scott, Commonwealth's attorney of Fauquier Co., the within-named defendant, in person, a true copy of this writ.

JNO. H. OVERBEY,
Spec. Deputy U. S. Marshal.

A copy.
Teste: M. F. PLEASANTS, *Clerk.*

46 *Answer of John Scott, of Fauquier, to Judge Bond's Rule. Filed Sept. 22d,* 1887.

Honorable Hugh L. Bond, judge of the circuit court of the United States for the eastern district of Virginia, at the court-house, in Richmond:

May it please your honor: In compliance with a rule issued by your honor against me to show cause before your honor, at the court-house in Richmond, on the 22nd day of September, 1887, at eleven o'clock a. m. of that day, why I should not be attached for contempt in disregarding a certain restraining order of your honor, made in the cause of Jas. P. Cooper, H. R. Beeton, F. J. Burt, *et als. vs.* Morton Marye, auditor, &c., R. Ayers, att'y gen'l, &c., *et als.*, on the 6th day of June, 1887, I appear now in your honor's court and submit this paper, which contains my answer to the said rule.

Your honor's restraining order forbade me, as Common-
47 wealth's attorney for the county of Fauquier, to discharge certain duties imposed upon me as one of the Commonwealth's attorneys of the State of Virginia, by a statute of the Legislature approved by the Governor May 12th, 1887, which in its 14th section provides, in case of disobedience by any officer to it, a penalty of not less than one hundred nor more than five hundred dollars.

As your honor well knows, it is a principle, recognized by publicists of all civilized countries as the foundation of political life, that a citizen or subject doing an act enjoined upon him by the State is covered by the panoply of the State, and is exempt from every degree of personal responsibility except to his own sovereign.

As a State can act only through the agency of individuals, this immunity is necessary to enable it to preserve itself and perform its other high functions.

An example of the application of this public law occurs in the history of the United States in the case of the State of New
48 York against McCloud, a British subject, who was released from prison by the direction of Mr. Webster, Secretary of State, ordering a *nolle prosequi* addressed to the attorney general of the State of New York. It was a command of the political power addressed to the judicial power and was based on the fact that McCloud's action had been adopted by the British Government as one performed by its authority. (Webster's Works.)

The principle of exemption referred to applies with all its force to the States of the American Union and to their agents, for these States are admitted to be bodies politic in the highest and completest sense of the words. (Poindexter *vs.* Greenhow, 114 U. S. R., page 288.)

But it is made a condition to enable a defendant to avail himself of the exemption that "it is necessary for him to produce a law of the State which constitutes his commission as its agent and the warrant for his act." (*Ib.*)

With this condition I comply now by directing your hon-
49 or's attention to the law of Virginia, before referred to, and

to the 3rd section, which is in these words: "The proceeding shall be by motion in the name of the Commonwealth on ten days' notice and shall be instituted and prosecuted by the attorney for the Commonwealth of the county or corporation in which the proceeding is, or, if it be instituted by direction of the auditor of public accounts, in the circuit court of the city of Richmond."

This act of Assembly was passed obviously with the design to induce the holders of tax-receivable coupons to submit them for identification and verification as required by the previous act of January 14th, 1882, the condition upon which the Commonwealth allowed her treasurers to receive the coupons for taxes.

This law has been examined by the Supreme Court of the United States in Antoin *vs.* Greenhow and it was decided by that final arbiter to be in accordance with the Constitution. (107 U. S. R., page 770.)

The statute to which I have referred in justification of my
50 acts, being designed simply to render a previous statute effectual, must be regarded as equally constitutional with it, for the means are appropriate and therefore ought to protect me from the censures of this court.

But in a very high quarter it is contended that if the State law which the agent or officer obeys be subsequently held to be unconstitutional by the court trying the cause it becomes a nullity and does not protect the officer from penal consequences, for only those laws—such is the doctrine—which are decided to be constitutional can be regarded by a Federal court as mandates of the State, an unconstitutional law, or such as a majority of the court may choose to say is unconstitutional, being but the unauthorized act of the individuals who compose the State government.

Thus is a State separated from its government without which it ceases to be a State.

To enable the learned judges to reach this eccentric con-
51 clusion it was found necessary to define a State to be "an ideal person, intangible, invisible, immutable," and incapable of wrong or error. (Mr. Justice Mathews in Poindexter *vs.* Greenhow, page 291.)

Thus, by the astuteness of a lawyer, a State is transformed into a mythical personage; along such strange lines does the judicial imagination sportively wander.

From what source that definition of a State of the Union was obtained is not known to me, but certainly it was not obtained from the Constitution and laws of the United States, the only lexicon which this court will consult in a case which so deeply concerns the highest franchise of a sovereign State, the liberty of its citizens, and the obedience of its officers.

May it please your honor, a State of the American Union is not a myth, but is a living corporation. It is composed of a collection of individuals inhabiting a defined geographical space, with a government and laws to organize and impart to them the characteristics of a body political, and which maintains constitutional
52 relations with the Government of the United States.

Thus defined a State is tangible, visible, mutable, and is capable of doing wrong and committing error, as the secession of Virginia and the other reconstructed States of south section will doubtless prove to so loyal a citizen as Mr. Justice Mathews.

The fourth section of article 4 of the Constitution provides that "the United States shall guarantee to every State of the Union a republican form of government." To convince your honor that this guaranty has been complied with in the case of Virginia I have but to refer to the re-admission of that State into the Union after the close of the civil war with a constitution accepted as republican by Congress. That was an act of the political power; it binds all, and this court cannot controvert or annul it.

Your honor will take judicial notice that the republican constitution of Virginia, accepted by Congress and guaranteed by the
53 United States, created a government of the people of Virginia, who are the State of Virginia, and that its government must be presumed by this court to be conducted in accordance with their wishes and by their commands. Its acts are their acts. They bind in contemplation of law as much as the acts of any deputy can bind his principal. This presumption of law, not the Supreme Court in the plenitude of despotic power seeking to subordinate the States to its absolute dicta, can break down or set at naught. Particularly is this true in this deplorable debt controversy, out of which this constitutional problem has arisen—a flower grown from a fetid soil—so interesting to every intelligent mind in the United States. It is known that over it the State of Virginia, or, to speak with a stricter propriety, a majority of the political body, has passionately taken jurisdiction, moving its representatives as puppets and dictating legislation in relation to it.

54 If this reasoning be correct I conclude that, whether the act of May 12 be considered constitutional or unconstitutional, it is equally the act of the State of Virginia, and that I, its commanded agent and officer, am not in contempt because when placed in the dilemma of contrary orders I have yielded obedience to my natural sovereign whose bread I eat and whose laws I have sworn to obey whenever I act as Commonwealth's attorney.

The State which directs my official conduct is, by the law of the civilized world, responsible for it, and to the State of Virginia I refer your honor as the responsible party in this case.

Arraign Virginia before your judgment seat; visit your penalties on her head.

But another deduction may be drawn from this reasoning which it is well not to overlook in this place.

If it be true, as a constitutional proposition, that all the acts of a republican government are assumed to be the acts of the State, and that this ruling of the Supreme Court is, indeed, a blow struck
55 at the sovereignty of the people of the States, it is a logical consequence that when a Federal court taxes jurisdiction of a State officer it thereby assumes jurisdiction of the State itself.

To hold otherwise is to evade its eleventh amendment and to treat the Constitution with contempt.

A single consideration will set this truth very clearly before your honor.

If, by afflicting the agents or officers of Virginia with imprisonment and confiscation, the Supreme Court can succeed in forcing the treasurers to accept coupons without verification and upon simple tender, upon whom, I ask, does the consequence fall? Not upon the treasurers; not upon the Commonwealth's attorneys. The consequence falls alone upon the State of Virginia, whose treasury, by this means, will have been bankrupted by unconstitutional action of the Supreme Court. The Supreme Court needs not to be informed that behind those treasurers and these Commonwealth's attor-
56 neys the State of Virginia stands to be affected by all the decisions against them.

Through all these mazes and crooked paths Virginia is the party whom the Supreme Court is seeking to reach; that State is the game they are hunting. Although the only party in interest, Virginia is not a party to the record, because the eleventh Amendment, which forbids a State to be sued in a Federal court by an individual, awkwardly stands in the way. No other reason can be assigned for the omission to stand her at the bar of the Supreme Court. Surely your honor will allow that this Court, because it is forbidden to entertain a suit against the State of Virginia, cannot therefore lay violent hands on me. A defect of power over the State is not a grant of power over the citizen.

This defect of jurisdiction significantly suggests that when th States fashioned the Constitution they did not design to confer upon the Federal court that jurisdiction, and it affords strong
57 support to the opinion that when the Constitution declares a State legislature shall not pass any law impairing the obligation of contracts it did not mean to include contracts made by the State itself, which, as a body political, it had the election to perform or not according to the dictates of its morality.

If, finally, it comes to be decided—for this great question is yet in a state of flunctuation—that a Federal court can constitutionally step between a State of the Union and its officers and agents and absolve them from obedience to it a most fatal blow will have been struck at the existence of the States of this Union.

The clouds will have begun to gather and preparation made for those evil times which prognosticators foretel- are ahead of this republic.

The States called this Union into existence, and from having been the massive pillars of a Federal system they will have sunk down into the degraded vassals of the Supreme Court.

58 Your honor will be pleased to take notice that this Federal Union, designed and constructed by the fathers of the republic for the habitation of a free people, may be destroyed as effectually by a consolidation of the States as by red-handed secession. When a stretch of judicial power is proposed which, if successful, must produce that result, surely, by this court, for that reason, it ought to be condemned as unconstitutional; but if your honor shall reject my arguments as vain and illusory and shall decide that I have acted

in contempt of your honor's authority, I am here to abide the consequences of your honor's displeasure.

All of which is respectfully submitted.

Richmond, September 22nd, 1887.

JOHN SCOTT,
Commonwealth's Attorney for Fauquier County, Virginia.

59 And at another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 24th day of September, 1887.

JAMES P. COOPER *et al.*
against
MORTON MARYE, Auditor, &c., *et al.* } In Equity. 432.

Upon motion of the complainants leave is given them to file a second amended bill, which is accordingly done, and upon reading the same it is ordered that John R. Turner, clerk of the circuit court of Fauquier county, Virginia, his agents and attorneys, successors and representatives, be *be* restrained from issuing any execution upon the following judgments entered by the circuit court of Fauquier county, at its term for September, 1887, to wit:

The State of Virginia against Jas. R. Green, Thomas Iden, Martha A. Anderson, as guardian, Martha A. Anderson, and as guardian, W. L. Royall, Mary A. Hamilton, Ann E. Shumate, E. J. Shumate, W. B. G. Shumate, George H. Lewis, John G. Cooke, W. L. Childs, J. E. Armstrong, Charles B. Skinker, committee of Thomas Smith,
60 B. B. Turner, C. K. Harrison, M. B. McIlhany, James K. Skinker, E. P. Turner, H. De Betts Norris, F. W. Maddux, M. C. Stribling, E. T. Holton, C. M. Strother, G. T. Strother & C. E. Strother, F. R. Welsh, Robert Murray, W. H. Strother, adm'r of John R. Strother and Fannie Combs, as the same are set out and described in the amended bill and exhibit thereto attached, until the further order of this court; and it is further ordered that Robert Whitacre, sheriff of the county of Fauquier, his agents, attorneys, successors, and representatives, be restrained from levying or putting into force and effect in any manner any execution which may have been heretofore issued upon any one of the judgments aforesaid or which may be hereafter issued upon any one of the judgments aforesaid until the further order of the court.

HUGH L. BOND,
Circuit Judge.

Marshal's Return.

Executed this 3d October, 1877, by delivering to Jno. R. Turner, clerk circuit court Fauquier Co., & Rob't Whitacre, sheriff of Fauquier Co., true copies of this order.

T. W. SCOTT,
U. S. Marshal.

61 *Second Amended Bill Referred to in Preceding Order.*

Circuit Court of the United States for the Eastern District of Virginia

JAMES P. COOPER, H. R. BEETON, *et als.*

v.

MORTON MARYE, Auditor, *et als.*

To the honorable judges thereof:

Complaining, shew unto your honors your orators, James P. Cooper, H. R. Beeton, F. J. Burt, H. J. Chinnery, W. M. Chinnery, F. P. Leon, and W. G. Woolston, by this their second amended bill filed by leave of the court, that they refer to and adopt as part of this amended bill their original bill and their first amended bill filed by leave of court on the 28th day of July, 1887.

Your orators show that John Scott is the attorney for the Commonwealth of Fauquier county, Virginia, John P. Turner is clerk of the circuit court of said county, and Robert Whitacre is sheriff of said county.

62 That on the eleventh day of June, 1887, the marshal of this district served upon the said John Scott a duly certified copy of the restraining order made in this cause on the 6th day of June, 1887, as will appear by this return on file in this cause.

That the said John Scott, after the service thereof and notwithstanding the same, in violation of the terms thereof, instituted suits in the circuit court of Fauquier county against a number of persons residing therein, under the provisions of the act of the Virginia Legislature, approved May 12th, 1887, particularly set out in the original bill, to compel payment by them of taxes alleged to be due to the State of Virginia, each one of said persons having tendered payment thereof in the State of Virginia's tax-receivable coupons, and the said Scott well knew when he commenced said suits that each one of said *suits that each one of said* persons had so offered to pay his said taxes.

63 A certificate of the clerk of the circuit court of Fauquier county, attached and marked W. L. R., shows the name of each of said persons and the amount claimed from each.

Your orators would further shew that the notices served upon said persons were returnable on the 6th day of September, 1877, and that on that day your orators caused R. R. Campbell, an attorney-at-law, duly qualified to practice in said court, to present to said court a duly certified copy of your orator's first amended bill herein, a duly certified copy of the restraining order, above mentioned, of June 6th, 1887, and duly certified copy of the order of the 23d of August, 1887, commanding the said John Scott to shew cause why he should not be attached for contempt in violating said restraining order, and the said Campbell moved said court upon said papers to continue said causes to the next term of said court, notwithstanding which the said court overruled said motions and proceeded to and did give judgment against each person mentioned in said Exhibit

W. L. R. for the amount demanded of each. Afterwards the
64 said Campbell moved said court to set said judgments aside and grant a new trial in each case, and moved, further, that these motions for new trials be continued to the next term; but the court overruled the motion to continue said motions to the next term, and then overruled the motions for new trials.

Your orators would further shew that in entering said judgments in contempt and defiance of the order of this court perpetual liens have been established upon the property of the persons sued, which will cause such of said persons as have bought their coupons from your orators to demand indemnity from your orators.

Forasmuch, then, as your orators are remediless save in this court, in equity, your orators pray that the said John R. Turner, clerk of said circuit court of Fauquier county; Robert Whitacre, sheriff of said county, and John Scott, attorney for the Commonwealth of said county, be made defendants hereto and required to answer the
65 same, but not under oath; that the said clerk be restrained and enjoined from issueing execution on said judgments, and that said sheriff be restrained from levying or putting in force in any way any executions which may have been or may be issued on any of said judgments, and that the said John R. Turner, clerk, &c., be required to produce before this honorable court the order book and the minute book of the circuit court of Fauquier county for September, 1887; that such proceedings may be had as will remove from the titles of the persons named in said Exhibit W. L. R. all cloud upon the same.

May the U. S. writ of subpœna issue; and your orators will ever pray.

COMPLAINANTS,
By WM. L. ROYAL, *Sol.*

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

This day William L. Royall personally appeared before me, A. B. Guigon, a notary public in and for the city aforesaid, and
66 made oath that the allegations of the foregoing bill are true to the best of his knowledge and belief.

Given under my hand this 21st day of September, 1887.

A. B. GUIGON, *N. P.*

In the Circuit Court of Fauquier County.

Commonwealth *vs.* James R. Green	$198 92
Same *vs.* Thomas Iden	35 08
Same *vs.* Martha A. Anderson, as gar.	8 40
Same *vs.* Martha A. Anderson & as gar.	41 04
Same *vs.* W. L. Royall	18 09
Same *vs.* Mary A. Hamilton	16 80
Same *vs.* Ann E. Shumate	9 12
Same *vs.* E. J. Shumate	5 07
Same *vs.* W. B. G. Shumate	25 71

Same *vs.* George H. Lewis	15	99
Same *vs.* John G. Cook	27	99
Same *vs.* W. L. Childs	33	94
Same *vs.* J. E. Armstrong	11	50
Same *vs.* Chas. B. Skinker, committee of Thos. Smith	29	93
Same *vs.* B. B. Turner	33	41
Same *vs.* C. K. Harrison	244	31
Same *vs.* M. B. McIlhany	15	76
67 Same *vs.* James R. Skinker	199	54
Same *vs.* E. P. Turner	49	76
Same *vs.* H. De Butts Norris	57	74
Same *vs.* F. W. Maddux	201	37
Same *vs.* M. C. Stribling	122	19
Same *vs.* E. F. Holton	132	75
Same *vs.* C. M. Strother	45	85
Same *vs.* G. T. Strother & C. E. Strother	63	90
Same *vs.* F. R. Welch	69	77
Same *vs.* Robert Murray	30	10
Same *vs.* W. H. Strother, adm'r of John R. Strother	12	60
Same *vs.* Fannie Combs	12	60

I certify that judgments were rendered by the circuit court of Fauquier county on 6th day of September, 1887, in each of the above cases for the amounts named, with int. on said amounts from 1st December, 1886, to said 6th Sept., 1887, & on the aggregate amounts from said last-named date until paid, & costs.

The defendants not appearing in either case.

I further certify that said judgments were founded upon notices similar to the following copy in the first-named case, varying only in names of parties and the amounts:

68 *Copy of Notice.*

"To James R. Green:

"You are hereby notified that I shall, in the name and on behalf of the Commonwealth of Virginia, move the circuit court of Fauquier county, on the 6th day of September, 1887, for judgment against you for the sum of one hundred and ninety-eight dollars and ninety-two cents, with legal interest thereon from the 1st day of December, 1886, being amount of taxes due by you to the said Commonwealth for the year 1886, still remaining unpaid, and for the payment of which (otherwise than for identification and verification) papers purporting to be genuine coupons of the Commonwealth have been tendered.

"See act of Assembly of Virginia, approved May 12, 1887, entitled 'An act to provide for the recovery by motion of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered.'

"JOHN SCOTT,
"*Commonwealth Attorney.*"

69 And on the 7th day of September, 1887, the following order was entered in said cases:

This day came the parties, by their attorn*ies*, and the defendants in each of these cases, by R. R. Campbell, their attorney, moved the court to set aside the judgments rendered in these cases against them on yesterday and grant them a new trial; which said motions are ordered to be docketed and continued to a future day of the term.

And on the 9th day of September, 1887, the following order was entered:

This day came again the parties, by their attorn*ies*, and the court doth overrule the motions made by the defendants in these cases, on a former day of the term, to set aside the judgments entered against them and to grant them new trials.

Given under my hand this 10th day of Sept., 1887.

JNO. R. TURNER, *Clerk.*

70 And at another day, to wit, at a circuit court of the United States for the district aforesaid held at Richmond, in said district, on the 4th day of October, A. D. 1887:

JAMES P. COOPER *et al.*
vs.
MARYE, &c., Auditor, *et als.* } No. 432. In Equity.

Upon motion of the complainants leave is given them to file their third amended bill, which is accordingly done, and, upon reading the same, it is ordered that Wm. B. Foster, clerk of the circuit court of Wythe county, in the State of Virginia, be restrained until the further order of the court from issuing execution upon any one of the judgments entered by the said circuit court, at its term for September, 1887, in the following cases, to wit: Commonwealth of Virginia against E. S. Guggenheimer, T. P. Wappett, S. F. Ewald, J. C. Cook, J. G. Wilkinson, G. S. Bruce, L. D. Harrison, R. L. Poage & Co., Stern Bros., Maupin & Bruce, R. P. Blackwell & Co., Frank & Co., H. J. Heuser, V. C. Huff, agent; E. H. Robinson, R. E. L. Huddle, J. H. McGavock, J. H. Wilson, A. C. Whitman, J. L. Copenhaver, Jno. P. Copenhaver, Eph. Copenhaver, D. H. Porter, Jno. M. Porter, Jno. A. Bourne, Jno. King, W. H. Bolling.

And this order is to apply equally to any deputy, agent, attorney, successor, or representative of said clerk who may have per-
71 sonal knowledge of the same; and it is further ordered that Isaac R. Harkrader, sheriff of said county, his deputies, agents, attorneys, representatives, and any other person who may have personal knowledge of this order, be restrained, until the further order of the court, from levying or putting in force in any manner any execution that may have been heretofore issued upon any one of said judgments and from levying or putting in force in any manner any execution that may be hereafter issued upon any one of said judgments; and it is further ordered that J. L. Gleaves, attorney for the Commonwealth for Wythe county, Virginia, shew cause

at the court-house in Richmond, Virginia, on Saturday, the 8th day of October, 1887, at eleven o'clock, why he shall not be attached for his alleged contempt of this court in disobeying its restraining order, made in this cause on the 6th day of June, 1887.

HUGH L. BOND,
Circuit Judge.

Marshal's Return.

Executed this the 6th day of October, 1887, by delivering to J. L. Gleaves, Commonwealth's att'y of Wythe county, the within-named defendants, in person, a true copy of this order.

T. W. SCOTT,
U. S. Marshal,
Per O.

72 *Third Amended Bill Referred to in Preceding Order.*

Circuit Court of the United States for the Eastern District of Virginia.

JAMES P. COOPER, H. R. BEETON, *et als.*

v.

MORTON MARYE, Auditor; R. A. AYERS, Att'y Gen'l, *et als.*

To the Hon. H. L. Bond, judge:

Complaining, shew unto your honor, your orators James P. Cooper, H. R. Beeton, F. J. Burt, H. J. Chennery, W. M. Chennery, F. P. Leon, and W. G. Woolston, by this their third amended bill, that they refer to and adopt their original bill and their first amended bill as part of this.

Farther complaining, your orators shew that J. L. Gleaves is attorney for the Commonwealth for the county of Wythe, in the State of Virginia; W. B. Foster is clerk of the circuit court of said county, and Isaac R. Harkrader is the sheriff of said county;
73 that the following-named persons who reside in said county tendered to the proper officers the State of Virginia tax-receivable coupons in payment of their taxes due to her for the year 1886, to wit: E. E. Enggenheinen, T. P. Wappett, S. F. Ewale, J. C. Cook, O. G. Wilkinson, S. G. Bruce, L. D. Harrison, R. L. Poage & Co., Stern Bros., Maupin & Bruce, R. P. Blackwell & Co., Frank & Co., H. J. Heuser, V. C. Huff, agent; E. H. Robinson, R. E. L. Huddle, J. H. McGavock, J. H. Wilson, A. C. Whitman, J. L. Copenhauer, Jno. P. Copenhauer, D. H. Porter, Jno. M. Porter, Jno. A. Bourne, Jno. King, W. H. Bolling.

That they were refused; that thereupon the said J. L. Gleaves, att'y for the Commonwealth, notified each of said persons that he would move the circuit court of Wythe county to render judgments against each of them for their said taxes, under the provisions of the act of March 12th, 1887, at its term for September, 1887. The said act is set

out with plaintiff's original and first amended bill; that prior to
74 the day when they were notified that judgment would be moved for, complainants caused a copy of the restraining order, made by the court in this case on the 6th day of June, 1887, to be delivered to the said J. L. Gleaves, att'y for the Commonwealth as aforesaid, a certified copy of which order is attached hereto; that notwithstanding said restraining order, and in defiance thereof, the said J. L. Gleaves moved said circuit court for said judgment, and said court rendered judgment against each one of the parties named at its said September term; that the clerk of said court is about to issue executions on said judgments, and the sheriff of said county is about to levy said executions and sell the property of said persons; that each one of said persons bought his coupons from your orators and received from James P. Cooper, one of your orators, his personal guarantee to save each one harmless; that if the said Cooper is
75 made liable upon said guarantee each one of your orators will be responsible ratably to him; that the said persons have notified said Cooper that if they are harmed under said judgments they will hold him responsible upon his said guarantee, and they have demanded of him that he make the same good, which will cause your orators to suffer an irreparable injury.

Forasmuch, then, as your orators are remediless save in this court, in equity, they pray that the said Wm. B. Foster, clerk of the circuit court of Wythe county, may be restrained and enjoined from issueing executions on said judgments, and that Isaac R. Harkader, sheriff of said county, may be restrained and enjoined from levying or putting in force any *any* executions that may have been or may hereafter be issued on said judgments; that the clerk of said court may be required to produce the record books of said court before this honorable court; that proper orders may be made for cancelling said judgments; that Wm. B. Foster, clerk of the circuit
76 court of Wythe county, and Isaac R. Harkrader, sheriff of said county, may be made parties defendant hereto and required to answer the same, but not under oath; that the United States writ of subpœna may issue; and your orators will ever pray.

WM. L. ROYALL,
Sol. for Complainants.

This day Wm. L. Royall personally appeared before me and made oath that the allegations of the foregoing bill are true to the best of his knowledge and belief.

WM. L. ROYALL.

Subscribed and sworn to before me this 4th day of October, 1887.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

77 Circuit Court of the United States for the Eastern District of Va. In Equity.

JAMES P. COOPER, H. R. BEETON, F. J. BURT, H. J. CHINNERY, W. M. CHINNERY, F. P. LEON, and W. G. WOOLSTON

vs.

MORTON MARYE, Auditor; R. A. AYERS, Attorney General; the Treasurers of Counties, Cities, and Towns in Virginia, and the Commonwealth Attorneys of Counties, Cities, and Towns in said State whose Names Complainants have Leave to Insert as they may be Discovered.

Upon reading the bill of the complainants it is ordered that Morton Marye, auditor; R. A. Ayers, attorney general; each and every treasurer of a county, city, or town in the State of Virginia, and each and every Commonwealth attorney for a county, city, or town in said State be restrained from bringing or commencing
78 any suit against any person who has tendered the State of Virginia's tax-receivable coupons in payment of taxes due to said State, as provided for and directed by the act of the Legislature of Virginia, approved May 12th, 1887, described in the bill, and of which a copy is attached thereto, and that each and all of said parties, their agents and attorneys, be restrained from doing any act to put said statute into force and effect until the further order of the court; and it is ordered that the motion for an injunction in this case be set down for hearing at the circuit court of the United States at Richmond, Virginia, on the first Monday in October next, provided that the attorney general of the State of Virginia or either of the defendants may move the court for an earlier hearing thereof after ten days' written notice to the solicitor of the complainants; and provided that a copy of this bill and of this order be served on the attorney general of the State of Virginia within
79 ten days after the filing thereof.

June 6, 1887.

HUGH L. BOND, *C't Judge.*

A true copy.
Teste:

M. F. PLEASANTS, *Cl'k.*

80 *Answer of J. L. Gleaves to Rule Against Him. Filed Octo. 8th, 1887.*

Hon. Hugh L. Bond, judge of the circuit court of the United States for the eastern district of Virginia, at the court-house in Richmond:

The answer of J. L. Gleaves, attorney for the Commonwealth for Wythe county, Virginia, to a rule issued by your honor and served upon him on the 6th day of October, 1887, ordering him to show cause at the court-house in Richmond, Virginia, on Saturday, the 8th day of October, 1887, at eleven o'clock, why he should not be attached for his alleged contempt of your honor's court in disobey-

ing its restraining order made on the 6th day of June, 1887, in the cause of James P. Cooper, H. R. Beeton, F. J. Benton, *et als. vs.* Morton Marye, auditor, &c.; R. A. Ayers, attorney general, &c., *et als.*, would respectfully state the following:

On the 1st day of September, 1887, J. W. Repass, treasurer of Wythe county, furnished your respondent a list of parties
81 who had tendered him coupons in payment of taxes as he was required to do by sec. 11, p. 259, act extra session, 1887, approved by the Governor May 12, 1887. By § 12 of same act the attorney for the Commonwealth is required to "forthwith institute and prosecute such proceedings as are hereinbefore required." Section 14 of same act prescribes a penalty upon any officer failing to act or perform any duty imposed upon him by this act. Respondent, never having any notice of your honor's restraining order in the above cause, proceeded, as required by the statute above cited, to institute such proceedings as were necessary to recover judgment for the Commonwealth of Virginia against the parties who had tendered coupons in payment of their taxes; and afterwards, to wit, on the — day of September, 1887, judgment was rendered for the Commonwealth against the above-named parties, they allowing the said judgment to go by default. In all this proceeding respondent was acting as an officer of the State of Virginia, whose constitution and laws he was sworn to observe and enforce when he qualified as such officer.

Respondent states that he was never legally served with a
82 copy of your honor's restraining order in the suit above referred to until the 6th of Oct., when a copy of the order entered upon the third amended bill in the above cause of Cooper *et als. v.* Marye *et als.* was served upon him by the marshall of the eastern district of Virginia.

Respondent states that a copy of the order entered by your honor on the 6 day of June, 1887, was handed to him by William H. Bolling, Esq., on the 9th day of September, 1887, but respondent claims that this was no legal or valid service of said order or such as is required by rule 15 regulating the service of process, which declares that "the service of all process mesne and final shall be by the marshall of the district or by his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case the person serving the process shall make affidavit thereof."

Respondent therefore claims that, never having had legal notice of any order or proceeding had and entered in your honor's court in the aforesaid cause of Cooper *et als. v.* Marye, auditor, &c.,
83 *et als.*, he has done nothing and been guilty of no act which would place him in contempt of your honor's court.

And now, having fully answered, respondent prays that the rule against him be discharged.

All of which is respectfully submitted.

J. L. GLEAVES,
Commonwealth's Attorney for Wythe County, Va.

The above answer was sworn to before me by J. L. Gleaves this 6th day of October, 1887.

WM. E. FULTON,
Com'r in Chancery for the County Court of Wythe Co., Va.

84 And now, at this day, to wit, at a circuit court of the United States for the eastern district of Virginia held at Richmond, in said district, this 8th day of October, A. D. 1887.

J. P. COOPER and Others
against
MORTON MARYE, Auditor, &c., and Others. } 432. In Equity.

This cause came on this day to be heard upon the motion of the complainants for a preliminary injunction and was argued by counsel; upon consideration whereof it is adjudged, ordered, and decreed, for reasons stated in writing and made part of the record, that the injunction be issued as prayed in the bill and remain in force until the further order of the court.

HUGH L. BOND,
Circuit Judge.

Thereupon the complainants, by counsel, called the attention of the court to the fact that the defendant, R. A. Ayers, attorney general of the State of Virginia, was guilty of contempt by his disobedience of the restraining order issued in this cause on the 6th day of June, 1887, and the said R. A. Ayers, being called upon to answer in this behalf, filed in open court his answer in writing, which answer is in the words following, to wit:

85 *Answer of Defendant, R. A. Ayers.*

The answer of R. A. Ayers, attorney general of the State of Virginia, to a rule awarded against him by this honorable court.

To the honorable judge of the circuit court of the United States for the eastern district of Virginia:

By an order entered in the chancery cause of James P. Cooper *et als.* against Morton Marye and others summoning him to show cause why he should not be fined and imprisoned for disobeying the injunction heretofore awarded in said suit restraining him and others from instituting the suits required by an act of the General Assembly of Virginia entitled "An act to provide for the recovery by motion of taxes and certain debts due the Commonwealth, for the payment of which paper purporting to be genuine coupons of the Commonwealth have been tendered," approved May 12th, 1887, by instituting a suit against the Baltimore and Ohio Railroad Co.,

86 respondent, answering, says that he admits that he instituted the suit against the Baltimore and Ohio Railroad Company to recover taxes due by it to the State of Virginia after he had been served with the injunction order in this case; that he instituted the said suit because he was thereunto required by the act of the

General Assembly of Virginia aforesaid, and because he believed this court had no jurisdiction whatever to award the injunction violated. Respondent disclaims any intention to treat the court with disrespect, and states that he has been actuated alone with the desire to have the law properly administered.

R. A. AYERS,
Att'y Gen'l of Va.

Subscribed and sworn to before me this 8th day of October, 1887.
M. F. PLEASANTS, *Clerk.*

And thereupon, the answers of defendants Scott, McCabe, and Gleaves to the rule against them having been heretofore filed, the following orders were entered, viz:

87 *In Re* RUFUS A. AYERS.

This matter came on this day to be heard upon the rule heretofore issued against Rufus A. Ayers, attorney general of the State of Virginia, to shew cause why he should not be attached for contempt in disobeying the restraining order heretofore granted in the suit of Cooper *et al. vs.* Marye *et als.*, on the 6th day of June, 1887, and his answer thereto.

On consideration whereof the court is of opinion and doth order and adjudge that the said Rufus A. Ayers is guilty of contempt in his disobedience of said order, and that he do forthwith dismiss the suit of the Commonwealth *vs.* The Balto. & Ohio Railroad Company, instituted by him in the circuit court of the city of Richmond, and that for his said contempt he be fined the sum of $500 and stand committed in the custody of the marshal of this court until the same be paid and he purge himself of his contempt by dismissing said suit last herein mentioned.

HUGH L. BOND,
Circuit Judge.

In Re J. B. MCCABE.

This matter came on this day to be heard upon the rule heretofore issued against J. B. McCabe, Commonwealth's attorney for the county of Loudoun, to shew cause why he should not be attached for
88 contempt in disobeying the restraining order of this court heretofore granted in the suit of Cooper *et al. vs.* Marye *et als.*, now pending in this court, and his answer thereto. On consideration whereof the court is of opinion, and doth order and adjudge, that the said J. B. McCabe is guilty of contempt in his disobedience of said order, aad that he do forthwith dismiss all suits under the act of May 12th, 1887, now pending in the circuit court of Loudoun county.

And the court doth further order and adjudge that the said J. B. McCabe for his said contempt be fined the sum of $100.00; that he be taken into the custody of the marshal of this court and by him held until the said fine be paid and he purge himself of said con-

tempt by dismissing the suits brought or prosecuted in violation of the restraining order of this court, and that he pay the costs of these proceedings.

HUGH L. BOND,
Circuit Judge.

In Re JOHN SCOTT.

The respondent in this case seems to the court, from his answer to the rule, to be so hopelessly blinded by the ancient doctrine of State sovereignty that he does not seem to know that on an illustrious day in her history Virginia gave her adhesion to the Constitution of the United States.

89 To punish a man under these circumstances as the court ought to punish a man of the ideas prevalent since the adoption of the Constitution would be manifestly unjust, and would be as unjust as it would be to punish a blind man equally with one who can see.

The court therefore doth adjudge, order, and decree that for his contempt of this court said John Scott do pay a fine of ten dollars and dismiss the cases which he has brought in the circuit court of Fauquier county, Virginia, in violation of the restraining order heretofore made in the cause of Cooper & others *vs.* Marye & others on the 6th day of June, 1887; and, further, that he enter satisfaction of the judgments heretofore obtained by him against the defendants in said causes, and that he stand committed to the custody of the marshal of this court until this order is obeyed and the fine hereby imposed upon him is paid.

And it is further ordered that said John Scott do pay the costs of these proceedings.

HUGH L. BOND,
Circuit Judge,

JAMES P. COOPER *et al.*
vs.
MARYE, Auditor, &c., *et als.* } In Equity.

In the matter of the rule issued October 4th, 1887, against J. L. Gleaves, attorney for the Commonwealth in the county of

90 Wythe, returnable to October 8th, 1877—

This day came this matter to be again heard on the papers formerly read and the answer of said J. L. Gleaves this day filed, and was argued by counsel; whereupon the court doth adjudge, order, and decree that said J. L. Gleaves, attorney for the Commonwealth for the county of Wythe, in the State of Virginia, do forthwith proceed to dismiss the suits or mark satisfied the judgments mentioned in said rule of October 4th, 1887, and his answer thereto, as instituted by him—that is to say, the following cases in the circuit court of Wythe county:

Commonwealth of Virginia *vs.* E. S. Guggenheimer, T. P. Wappett, S. F. Ewald, J. C. Cook, J. G. Wilkinson, G. S. Bruce, L. D. Harrison, R. L. Poage & Co., Stern Bros., Maupin & Bruce, R. P. Blackwell & Co., Frank & Co., H. J. Henser, V. C. Huff, agent, R. E.

L. Huddle, J. H. McGavock, J. H. Wilson, A. C. Whitman, J. L. Copenhaver, Jno. P. Copenhaver, Eph. Copenhaver, D. H. Porter, Jno. M. Porter, Jno. A. Boarne, Jno. King, W. H. Bolling.

And he is ordered to report his action hereunder to this court on or before the 24th day of October, 1887.

Ordered further, that the rule herein, entered October 4th, 1887, against said J. Gleaves, attorney for the Commonwealth for the county of Wythe, in the State of Virginia, be, and the same is
91 hereby, enlarged until said 24th day of October, 1887.

HUGH L. BOND,
Circuit Judge.

UNITED STATES OF AMERICA, } *ss:*
Eastern District of Virginia, }

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the cause in the caption hereof mentioned up to the date hereof as the same remain in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, Va., this 9th day of October, 1887.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk.*

92 *Opinion. Filed October 7th,* 1887, *by Hon.* HUGH L. BOND, *Circuit Judge.*

In the Circuit court of the United States for the Eastern District of Virginia.

Opinion.

THE VIRGINIA STEAMBOAT COMPANY

vs.

MORTON MARYE *et als.*

JAMES P. COOPER *et al. vs.* MORTON MARYE *et als.*

SAME *vs.* JAMES B. McCABE *et als.*

SAME *vs.* S. B. WITT.

The bills of complaint filed in these cases have a common purpose, and that is to restrain the defendants, who are officers of the State, from putting into force certain acts of the Legislature recently passed in reference to tax payers who have tendered or shall hereafter tender the coupons of the bonds of the State in payment of taxes.

Upon the presentation of the bills of complaint a restraining order was issued, and this hearing is to determine whether or not an injunction should issue perpetually enjoining the defendants from proceeding to enforce the laws in question, as prayed in the bills of

complaint. The cases have been argued together as if upon demurrer. There is no dispute about the facts, but inferences drawn from them by the complainants are denied. The bill of the steamboat company, a corporation chartered by the State, alleges that it was indebted to the State, in December, 1866, in a sum exceeding $2,000 for taxes assessed against it; that in December, 1866, the complainants tendered to Morton Marye, who then as now was the auditor of the State, genuine coupons cut from the bonds of the State and by law made receivable for taxes, to the amount of its indebtedness, which coupons the defendant, Marye, refused to receive because the act of the General Assembly of Virginia, approved January 26, 1882, forbade him so to do. The bill further alleges that by an act of the General Assembly of Virginia, approved May 12, 1887, the auditor, in conjunction with S. B. Witt, attorney for the commonwealth of Richmond, or R. A. Ayres, attorney general for the State, is required to bring a suit against the complainant in the circuit court of the city of Richmond for said taxes, which suit they threaten to bring notwithstanding the tender above mentioned, in which suit the complainant by the said act is required to plead the tender in writing, and an issue is to be made up to try whether the coupons so tendered are genuine or not. And the bill further shows that upon the trial of the issue so required to be made up the State of Virginia, by another act, approved January 26, 1886, requires the defendant in this action (the complainant here who has tendered coupons in payment of taxes) to produce the original bond from which the tendered coupons were cut, in order to establish their genuine character; and that by another act, approved January 21st, 1886, no expert testimony is allowed to be used at the trial of the issue, although coupons and the signature thereto are not written, but engraved, and heavy costs and penalties are provided for those defendants who do not, under these provisions of the law, make good their case. Copies of these statutes are filed with the bill, and are prayed to be made part thereof.

So far as the case of the steamboat company against Mayre is concerned it presents the principal questions for consideration. The amount involved in the suit or controversy is ample to maintain the jurisdiction of the court, but as the complainant and defendants are citizens of Virginia, the court would be without jurisdiction unless the case involves some question arising under the Constitution of the United States. That question is whether the acts of the General Assembly complained of in the bill and which they are about to enforce against the complainants are repugnant to section 10 of article I of the Constitution of the United States.

When the State of Virginia, by act of her General Assembly, approved March 30th, 1871, provided for the issue of her bonds, bearing interest coupons made in terms receivable for taxes, she entered into a contract with the holders of them to receive them when presented in payment of taxes due. They were made negotiable, payable to bearer, and like all other negotiable paper for the payment of money were *prima facie* genuine.

The Constitution of the United States declares that, having entered

into a contract, no State shall pass any law impairing its obligation. The Supreme Court of the United States has said in Poindexter and Greenhow, 114 U. S. Reports, "that the legislation of Virginia, in relation to its debt up to that time, must be considered as a whole." The acts of Assembly in question must be taken together, as one is but an amendment to the other. The scheme of the whole is indivisable and cannot be separated into parts, and it is further declared that the whole legislation, in all its parts as to the creditors affected by it and not consenting to it, must be pronounced null and void. Since the rendering of this judgment the State of Virginia, as it appears from the bill in the case, has added three further amendments to the coupon legislation.

By the act of May 12th, 1887, the treasurer of each city, county, and town in the State is ordered to furnish the State's attorney with a list of all persons who have tendered coupons in payment of their taxes, and the attorneys are required to bring suit to recover the amount of taxes for which coupons are tendered. By the act of January 26th, 1886, it is provided in such suit the coupon holder shall produce the bonds from which the coupons were cut, and by the ——, 1886, that after producing the coupons the defendant taxpayers shall not prove by experts the genuine character of either bond or coupon. When we add these amendments to the legislation of Virginia, already declared by the Supreme Court to be void, they do not seem to improve the constitutional character of that legislation.

When first issued these coupons were negotiable instruments for the payment of money were *prima facie* genuine. Now it is provided that they shall be *prima facie* spurious, and shall not be received till affirmatively proved in some court genuine. When first issued the coupon itself was a whole self-sufficient contract, payable in money and receivable for taxes. Now it is made worthless for the purpose of payment of taxes without the accompanying bond, which itself is not receivable for taxes, and when added to this legislation the act of — ——, 1886, which forbids the only mode of proof of an engraved bond known to litigants when the obligor is perverse, it must appear that the value of a tax-receivable coupon is almost entirely destroyed. If the substance of these three acts of Assembly had been printed on the backs of the coupons when first issued, it must be apparent they never would have found a place in the money market of the world. I have no hesitation in saying, in view of the decisions of the Supreme Court in coupon cases which have come before it, that this subsequent legislation is in line with former efforts condemned by that court to destroy the value of the tax-receivable coupon in the hands of the present holder, and is in defiance of one of the three departments of the Government—the judicial department—to the judgments of which, as the supreme law of the land, every one is bound by the constitution to submit. It is just to say that at this hearing no one has attempted to defend the purposes of these acts or to maintain their constitutionality as a whole. Granting the unconstitutionality of the acts of the Assembly, the second question is, Has the circuit court jurisdiction to pre-

vent the officers of the State from putting them in force against these defendants.

This is denied because of section 720 of the Revised Statutes, which provides, "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunctions may be authorized by law relating to proceedings in bankruptcy."

To this it is sufficient answer to say that so far as the steamboat company's case is concerned, proceedings in the State courts are as yet only threatened, and even had they been attempted it is equally sufficient answer to say that there can be no proceedings in any court, State or Federal, under any unconstitutional statute. The whole matter would be *coram non judice*, and the judgment of the court no protection to the officers attempting to enforce it.

So far as the steamboat company's case is concerned, we have State officers endeavoring to enforce an illegal statute against it, although it has paid its taxes in coupons, which the Supreme Court has decided to be a valid payment. This brings the case precisely within the principles laid down in Osborne against Banks, 9 Wheaton, 758. In that case the bill was filed against the auditor of Ohio to restrain him from proceeding against the bank under an act of the Legislature of that State, and the sole question then presented was, according to the record in that case, was the plaintiff entitled to relief in equity and to the writ of injunction, and the court decided that it was.

The act of the Legislature of Ohio was there characterized as an attempt to drive the bank of the State. It is not too much to say that the attempt here is to totally destroy the complainant's property in coupons, and to mulct it in costs for tendering that which the Supreme Court has solemnly decided the defendants were bound to receive in payment.

The remedy granted in Osborne against Bank was the remedy by injunction, and Mr. Justice Bradley, in the dissenting opinion in Poindexter and Greenhow, declares such to be the remedy of the citizen when threatened with an unconstitutional proceeding. It is a preventive remedy to stay the progress of approaching injury, and in accordance with a long line of decisions to the like effect, Mr. Field, in his late work on Federal courts, says: "If a State law is in conflict with the Constitution of the United States, and a State officer is about to execute it, this would be a proper case for the exercise of the original jurisdiction of a circuit court to restrain him.

We come next to consider the second case before the court, James P. Cooper *et als. vs.* Morton Marye *et als.*, which differs from the Steamboat Company in that the complainants are now resident aliens. So far, therefore, as the parties to the suit are concerned this Court is given jurisdiction by the statute, and the only objection to the exercise of it, beside those made in the steamboat case, is that the complainants have no such interest in the controvery or suit as to entitle them to relief in equity in this court. What is that interest? The bill alleges that the complainants are joint owners of $100,000 worth of the coupons of the State receivable for taxes; that

they purchased them in open market for sale to the tax-payers of Virginia, and have already sold more than $50,000 worth of them to such tax-payers, many of whom and to a much larger amount than $2,000 have tendered these coupons in payment of their taxes; that the complainants are joint and several guarantors to the purchasers of these coupons that they are genuine coupons, and if the acts of assembly above referred to are enforced against tax-payers as threatened in this case and as already been done in the third and fourth cases by their contract with the purchasers who have so tendered the coupons for taxes they will have to pay all the costs, losses, and damages suffered by the tax-payers in the suit brought under these acts; and they further allege that the coupons unsold in their hands will be rendered worthless by the proceedings against the tax-payers which have already purchased and tendered a part of them; and they allege that the costs alone which, as guarantors, they would have to pay would amount to greatly more than a sum necessary to give jurisdiction to this court.

It is my opinion that this is a sufficient pecuniary interest to give complainants a standing in the circuit court. They are the holders of certain choses in action negotiable, valuable, marketable, and useful in the payment of taxes. Every person to whom the complainants sell them, and who use them for the only purpose for which they are sold, is required by law to be sued for so doing, and by law it is made impossible to defend the suit. All purchasers from the complainants when sued are entitled to call on them to defend such suits as may be brought, and the expenses of so doing is greater than the value of the coupons.

There is no question or doubt as to whether or not the defendant State officers will proceed to enforce these acts and create the loss to the complainant. The act is imperative, and the officers are bound to obey it till it is declared unconstitutional. In the case at bar, where suits have already been brought against purchasers, with guarantee in writing from complainants, there can be but little doubt that the amount in controversy exceeds the jurisdictional amount required by statute, and as little that the remedy by injunction to prevent a multiplicity of suits and stop grievous wrong attempted by State officers without any authority is the proper remedy. The case differs from that of Marye and Parsons. Here there is no attempt to make a State officer by mandatory injunction receive coupons from a coupon-holder who was not a tax payer, as was attempted then.

This is an application for injunction to prevent State officers from enforcing an unconstitutional law against tax payers who may purchase coupons for the payment of taxes from the complainants, and thus render those coupons they have sold and those they hold equally worthless. So far as the coupons in the hands of the complainants unsold are concerned it appears to me that when the State announces to all tax payers, who alone can or will purchase them, that if they do so the State will refuse to receive them for taxes, but will bring suit against every tax payer who offers them, it violates every obligation of its contract and utterly destroys the value of

complainants' property. It is idle to say that complainants ought to wait until each small tax payer is sued before they seek to enjoin the officer.

The very object of the writ of injunction, as we said before, is to prevent wrongs and a multiplicity of suits likely to equal in number the number of coupons sold by them; and it is equally idle to say that the complainants have a remedy at law, for even if that were so, which is not the truth in fact, to forbid the equity court from issuing the writ of injunction there must not only be a remedy at law, but that remedy must be equally as prompt, certain, and efficient and general as the remedy in equity.

In the case of Allen against the Baltimore and Ohio railroad, which presented the question whether this court had the power to restrain an officer of Virginia in the execution of an unconstitutional statute, the Supreme Court, 114 U. S., 316, sums up the whole matter. Where the rights in jeopardy, says this court, are those of private citizens, and are of those classes which the Constitution of the United States either confers or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and proceedings purely legal, the same necessity invokes and justifies in cases to which its remedies can be applied, that jurisdiction in equity vested by the Constitution of the United States and which cannot be affected by the legislation of the States.

No one has attempted to defend the constitutionality of the system of legislation which we have been considering. The act of 1887 is popularly known through the public press as the "coupon crusher," and is well styled, for its effect is to destroy as well the negotiability as the tax-receivable character of the coupon.

The injunction will issue as prayed in each case.

[Endorsed:] Supreme Court U. S. 1887, October term. Nos. 4, 5, & 6. Orig'l. *Ex parte.* In the matter of R. A. Ayers, John Scott. (Exhibit.) Record in the case of Cooper *vs.* Mayre.

h THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Thomas W. Scott, marshal of the United States for the eastern district of Virginia, Greeting:

We command you that the body of J. B. McCabe, in your custody detained, as it is said, by whatsoever name he may be charged, together with return of the day and cause of his detention, you have before the Supreme Court of the United States, sitting in the Capitol of the United States, at the city of Washington, being the present seat of the National Government, on Monday, the 17th day of October inst., then and there to do, receive, and submit to all and singular whatsoever the said Supreme Court shall consider concerning him in this behalf; and have you then and there this writ, with your doings in the premises.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the twelfth day of October, in

the year of our Lord one thousand eight hundred and eighty-seven.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

i [Endorsed:] Sup. Court U. S. Oct. term, 1887. No. 6. Original. *Ex parte* in the matter of J. B. McCabe, petitioner. Writ of *habeas corpus* and proof of service.

[Stamped:] Office Supreme Court U. S. Filed Oct. 15, 1887. James H. McKenney, clerk.

I, Jno. G. Nicolay, marshal of the Supreme Court of the United States, certify that I served the within writ by reading it to Thomas W. Scott, United States marshal for the eastern district of Virginia, and showing him the seal thereof, at Richmond, on October 14th, 1887.

JNO. G. NICOLAY, *Marshal.*

j To the honorable Supreme Court of the United States:

As I am commanded by the writ of *habeas corpus* hereto annexed, I here bring the body of J. B. McCabe, who is in my custody and detained by me by virtue of an order, judgment, decree, and commitment of the circuit court of the United States for the eastern district of Virginia, and I attach hereto and make a part of this my return a certified copy of said order and judgment, marked Exhibit A; and I further return that the said McCabe has not paid and refuses to pay the fine imposed upon him by said order.

THOS. W. SCOTT,
United States Marshal for the Eastern District of Virginia.

k *On Attachment for Contempt.*

In the Circuit Court of the United States for the Eastern District of Virginia.

"*In re* J. B. McCABE.

"This matter came on this day to be heard upon the rule heretofore issued against J. B. McCabe, Commonwealth's attorney for the county of Loudoun, to show cause why he should not be attached for contempt indisobeying the restraining order of this court heretofore granted in the suit of Cooper *et als. vs.* Marye *et als.*, now pending in this court, and his answer thereto. On consideration whereof the court is of opinion and doth order and adjudge that the said J. B. McCabe is guilty of contempt in his disobedience of said order, and that he do forthwith dismiss all suits under the act of May 12th, 1887, now pending in the circuit court of Loudoun county.

And the court doth further order and adjudge that the said J. B. McCabe, for his said contempt, be fined the sum of $100.00; that he be taken into the custody of the marshal of this court and by him held until the said fine be paid and he purge himself of said con-

tempt by dismissing the suits brought or prosecuted in violation of the restraining order of this court, and that he pay the costs of these proceedings.

Richmond, October 8th, 1887.

HUGH L. BOND,
Circuit Judge.

A copy.

[Seal United States Circuit Court, Eastern District of Virginia.]

Teste: M. F. PLEASANTS, *Clerk.*

[Endorsed:] Exhibit A.

l THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Thomas W. Scott, marshal of the United States for the eastern district of Virginia, Greeting:

We command you that the body of J. B. McCabe, in your custody detained, as it is said, by whatsoever name he may be charged, together with return of the day and cause of his detention, you have before the Supreme Court of the United States, sitting in the Capitol of the United States, at the city of Washington, being the present seat of the National Government, on Monday, the 17th day of October inst., then and there to do, receive, and submit to all and singular whatsoever the said Supreme Court shall consider concerning him in this behalf; and have you then and there this writ, with your doings in the premises.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.] (Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

True copy.

[Seal of the Supreme Court of the United States.]

Test: JAMES H. McKENNEY,
Clerk of the Supreme Court U. S.

m [Endorsed:] Supreme Court U. S. 1887, October term. No. 6. Original. *Ex parte* in the matter of J. B. McCabe, petitioner. Return to writ of *habeas corpus.*

[Stamped:] Office Supreme Court U. S. Filed Oct. 17, 1887. James H. McKenney, clerk.

n *On Return to a Writ of Habeas Corpus.*

Supreme Court of the United States, of October Term, 1887.

In Re RUFUS A. AYERS, No. —.

It is stipulated and agreed that in the above-stated case in the order and commitment attached to the marshal's return that the certified copy of said order attached and marked Exhibit A is erroneous, in that the parties to the suit set forth in the order are reversed, and instead of reading Marye *et al. v.* Cooper *et al.* should read Cooper

et al. v. Marye *et al.*, and in the consideration of the case said
o order shall be treated as amended to conform to the facts of the case as herein stated.

Oct. 17, 1887.

RUFUS A. AYERS,
By counsel, C. V. MEREDITH.
G. A. JENKS,
Solicitor General.

[Endorsed:] Supreme Court U. S. 1887, October term. No. 4. Orig'l. *Ex parte* in the matter of Rufus A. Ayers, petitioner. Stipulation to amend title of cause mentioned in return to writ.

[Stamped:] Office Supreme Court U. S. Filed Oct. 17, 1887. James H. McKenney, clerk.

p Supreme Court of the United States. October Term, 1887.

Ex Parte in the Matter of RUFUS A. AYERS, Petitioner;

Ex Parte in the Matter of JOHN SCOTT, Petitioner;

AND

Ex Parte in the Matter of J. B. McCABE, Petitioner.

The marshal of the United States for the eastern district of Virginia, agreeably to the writs of *habeas corpus* herein to him directed, commanding him to have the bodies of the petitioners herein in his custody, brings into Court here the said petitioners accordingly. Whereupon it is now here ordered by the Court that said petitioners be, and they are hereby, committed to the custody of the marshal of this court, who, being present, takes charge of them.

Oct. 17, 1887.

IN THE

Supreme Court of the United States.

No. 6. Original.

EX PARTE IN THE MATTER OF R. A. AYERS ET ALS.
PETITION FOR HABEAS CORPUS.

BRIEF FOR PETITIONERS.

C. V. MEREDITH,
W. W. GORDON,
J. R. TUCKER,
ROSCOE CONKLING,
Of Counsel.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

No. 6. Original.

EX PARTE IN THE MATTER OF R. A. AYERS ET ALS.
PETITION FOR HABEAS CORPUS.

BRIEF FOR PETITIONERS.

STATEMENT OF CASE.

Bill filed in the circuit court of the United States for the eastern district of Virginia by James P. Cooper and others against Morton Marye and others, June 6, 1887.

The bill made Morton Marye, auditor of Virginia, R. A. Ayers, attorney general of Virginia, and the treasurers and Commonwealth attorneys of every county, city, and town in Virginia parties defendant to said bill, and prayed that they, their agents and attorneys, be restrained and enjoined from commencing or bringing any suits provided for by the act of the General Assembly of Virginia approved May 12, 1887, or from doing any other act to put the same into force and effect.

Plaintiffs aver that they are citizens of Great Britain, and that they had bought large numbers of the coupons taken from bonds of said State issued under the acts of her Gen-

eral Assembly, passed in 1871 and in 1879, for the purpose of selling them to the tax-payers of Virginia, to be used by them as tenders for taxes due said State, and that the said act of May 12, 1887, prevents them from selling their coupons to tax-payers, and that the injunction prayed for is necessary to enable the plaintiffs to sell their coupons, &c.

A copy of the act of May 12, 1887, is made an exhibit with the bill.

Upon the reading of the bill an order was entered restraining the said auditor, attorney general, and each and every treasurer and Commonwealth attorney in the State "from bringing or commencing any suit against any person who has tendered the State of Virginia tax-receivable coupons in payment of taxes due to said State as provided for and directed by the act of the Legislature of Virginia, approved May 12, 1887," and from doing anything to carry it into effect.

Said order was served on R. A. Ayers, attorney general, June 7, 1887.

Complainants filed an amended bill July 28, 1887, reiterating the averments of their original bill and further averring that they had sold $50,000.00 of coupons to tax-payers of Virginia, who had tendered the same to officers of the State who had refused them, &c.

A second amended bill averred that John Scott, a Commonwealth's attorney for Fauquier county, had obtained, despite the restraining order made as aforesaid, a number of judgments for the Commonwealth of Virginia against a number of tax-payers, and praying an injunction restraining the clerk of said county from issuing and the sheriff from levying any executions thereon whereby liens were established upon the real property of said defendants.

A third amended bill was filed, similar to the second, in respect of the officers of Wythe county.

On the 8th of October, 1887, an injunction was granted according to the prayer of the bill.

Rules were, upon affidavits, awarded against the petitioners severally to show cause why they should not be attached for their contempt in disobeying the orders of the court, and in their answers they were severally committed for contempt. These orders are to be found on pp. 42, 43 of the printed record.

The attorney general was fined $500.00 and ordered to dismiss the suit of the Commonwealth *vs.* Balt. & Ohio R. R. Company, instituted by him in the circuit court of the city of Richmond, and that he be committed until the fine be paid "and he purge himself of his contempt by dismissing said suit."

J. B. McCabe was fined $100.00 and was committed until the fine was paid "and he purge himself of said contempt by dismissing the suits brought or prosecuted," &c.

John Scott was fined $10.00 and was committed until he paid the fine and dismissed the cases brought by him and "enter satisfaction of the judgments heretofore obtained," &c.

On these orders of commitment the petitioners pray to be discharged.

Points.

Your petitioners insist that their imprisonment is without legal authority, on the following grounds:

I.

The restraining order or injunction was to proceedings in a State court, and is beyond the jurisdiction of the court, under the provisions of the act of Congress. (§ 720, R. S. of U. S.)

This will readily appear.

By the judiciary act of 1789 (C. 20, § 14) the power to issue writs by the circuit courts was limited by the words "Which may be necessary for the exercise of their respective juris-

dictions and agreeable to the usages and principles of law." (See R. S., § 716.)

The act of March 2, 1793 (C. 22, § 5) provided "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State."

The original power to award injunctions in the circuit court of the United States is derived from these provisions and with this limitation. In its original grant it was as auxiliary to the exercise of its jurisdiction. The limitation by the act of March, 1793, was placed upon it at the same session that the Eleventh Amendment to the Constitution was proposed, and both were conservative of State exemption from Federal interference.

Afterwards an exception to this limitation was made in cases of bankruptcy.

A criticism has been made that this statute forbids injunction to stay proceedings begun in a State court, but not to prevent their institution. There is no reason for such a distinction. If Congress thought to inhibit interference with State jurisdiction, the evil was as great if it prohibited the institution as the progress of judicial procedure. It is true the intent was to forbid an injunction to further proceedings in a State court of concurrent jurisdiction which had by previous suit assumed jurisdiction of the matter, but the courts have since allowed injunctions where a State court by subsequent suit sought to vest the Federal court's jurisdiction, but this was because necessary under section 14 of the act of 1789. But it could never have been intended as in this case has been done, that a Federal court should assume jurisdiction only for the purpose of injunction to forbid the bringing of suits in a State court which is not ancillary to any subject-matter over which it had jurisdiction, for in this case no relief is sought against these defendants. The jurisdiction is assumed to prevent action in a State court, not to give any remedy in the Federal court.

We refer to Daly *vs.* Sheriff, 1 Woods, 175, where the

learned judge says the "Federal court cannot interfere with the powers of the State courts, save in cases where the jurisdiction of the subject-matter is *exclusively* vested in the Federal courts, as in proceedings in bankruptcy," &c. See also R. R. Co. *vs.* Scott, 4 Woods, 386; Fish *vs.* R. R. Co., 10 Blatch., 518, where it is held that section 14 of act of 1789 must be construed with section 5 of the act of 1793; see also *In re* Schway, 14 Fed. Rep., 787, where the word "stay," as to proceedings, is held to mean to restrain the institution of suits as well as to stop those proceedings already begun. (18 Fed. Rep., 617.)

We refer also to Diggs *vs.* Wolcott, 4 Cranch, 179; Peck *vs.* Jenness, 7 How., 625; Freeman *vs.* Howe, 24 How., 450; Watson *vs.* Jones, 13 Wall., 679; French *vs.* Hay, 22 Wall., 250; Haines *vs.* Carpenter, 91 U. S., 254; Dial *vs.* Reynolds, 96 U. S., 340; Dietzsch *vs.* Huidekoper, 103 U. S., 494.

In Haines *vs.* Carpenter, *supra*, the injunction was asked to stay proceedings begun and prevent those not. The court denied both, which is agreeable to our contention.

See the language of section 5106, which seems not to contemplate the power to prevent the institution of proceedings.

II.

The act of 1789, section 16, continued in R. S., section 723, provides—"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Mr. Justice Baldwin, in Baker *vs.* Brown, 1 Bald., C. C., 405, holds this to be an absolute limitation on the jurisdiction, and any decree beyond this grant of jurisdiction is void.

We insist, that the remedy in this case at law, were the proceeding in a court of the United States, would make this bill in equity of no force; but as against an adequate rem-

edy in a State court this injunction is null and of no force, for reasons stated under this as under the first point. The statute complained of provides for the defense by plea of tender and for trial by jury, and if the right of the defendant under the Constitution of the United States be infringed his ultimate appeal to this Court would protect him.

III.

Complainants had no equity by their original bill or any of the amended bills.

They are not tax-payers; they are speculators in coupons. No right as tax-payers to tender coupons is asserted in their behalf. In an amended bill and in one paper (p. 14, Record) it appears that complainants sold coupons to tax-payers on a covenant to furnish counsel and save harmless the buyers. But this gives no equity to the complainants, as asserted in this case. This is shown by the decision of this Court in Carter *vs.* Greenhow, 114 U. S., 317. The case presented here as there is an abstract issue, not a practical one, until by judicial procedure the right of the tax-payer is denied. And in Marye *vs.* Parsons, 114 U. S., 325, this Court held that coupon-holders, if not tax-payers, could not have the benefit of injunction. It is *damnum absque injuria*. The complainants demand an abstract decree, not a practical remedy for any wrong to them, according to Hagood *vs.* Southern, 117 U. S., 52.

In the only cases referred to in the record of a tax-payer's complaint it does not appear that the tax-payer asserted his right in the suits complained of and that his right was denied. The bill is without equity and the injunction utterly void.

IV.

There is not only no equity in complainants, but if there were there is none against the defendants, your petitioners.

They are lawyers, it is true—legal officers of the State (as to which more hereafter).

These petitioners have no legal or equitable interest in the suits or in the taxes for which they are instituted. They do not collect them if recovered by judgment. They are officers of court, with license to practice law. This injunction restrains their right to practice law in a class of cases, because it really (as we shall see) intends to restrain the client, the State, from bringing the suits. The act of the attorney invades no right; it is the act of the client, if any act does.

If, therefore, the complainants have equity, they have none to restrain an attorney who brings a suit. If they have equity against the State, whom they do not seek to injoin, they have none to restrain the business of the lawyer whom the State employs, for he has no interest in the suit nor in the subject-matter of it, present or prospective. (Poore *vs.* Clark, 2 Ath., 515; Cockburn *vs.* Thompson, 16 Ves., 325; Wilkins *vs.* Fry, 1 Meriw., 262; Kerr *vs.* Watts, 6 Wheat., 550; Caldwell *vs.* Taggart, 4 Pet, 190; Mechanics' Bank *vs.* Sexton, 1 Pet., 299; Story *vs.* Livingston, 13 Pet., 359; McArthur *vs.* Scott, 113 U. S., 340; Williams *vs.* Bankhead, 19 Wall., 563.) The only possible method of avoiding this conclusion is to hold that these officers are *the State;* but that is fatal to the pretensions of complainants on another ground.

It may be said that the agents of the State may be enjoined where the State cannot be a party, as in Osborne *vs.* Bank, 9 Wheaton, and Allen *vs.* B. & O. R. R., 114 U. S., and other Virginia coupon cases.

But in all those cases the agent held the tangible subject-matter of the controversy—in the first case the taxes collected unlawfully, in the others the property levied on. The hand which held the *property* claimed by complainants was restrained. In this case the attorney holds nothing, has interest in nothing, claims right to nothing which com-

plainants or their coupon-buyers assert right to. They bring a suit on the claim of another. Their client seizes nothing, but challenges judicial decision on the questions at issue.

Can it be that such an injunction against such parties is other than null and void?

V.

If the injunction be lawful then was the commitment lawful or did it not transcend the power of the court?

Conceding all that has thus far been controverted, we insist that the order of commitment was without authority.

By the Eighth Amendment of the Constitution of the United States excessive fines are forbidden and cruel and unusual punishments.

In this case imprisonment is adjudged to these petitioners until they shall dismiss the suits brought by them for the State of Virginia and enter satisfaction of judgments in her favor—that is, until they shall betray their professional trust, violate an official duty, and enter falsely a satisfaction of another's judgment, which they know has never been satisfied.

This order is void—

1st. Because it makes the term of imprisonment without end or determinable only upon an impossible condition.

2d. Because it is really operative only on the right and interest of the State, who is not a party in this case and cannot be made one, but is decreed against by a duress of imprisonment on her officers to violate their duty by destroying her rights.

Osborne *vs.* Bank of U. S., 9 Wheaton, may be again cited in opposition to this position; but there the fund, the *res litigata*, was in the hands of the agent—here it never was.

VI.

The only ground for this injunction is that the law of 1887 is unconstitutional, and that the authority thereby given to the attorney general and other attorneys for the State is null and void.

This brings up the question, Is that law a violation of the Constitution of the United States?

For a moment look at the circumstances under which it was passed.

This Court had decided that any levy by an officer after tender of genuine coupons and not accepted was illegal and made the officer a trespasser. The officer became a trespasser if he levied, and was liable to the State if he accepted coupons which turned out to be spurious, against which she had a clear right to protect herself. These treasurers in the country were not experts, and she might well distrust their judgment in receiving all which were tendered.

And when tendered and refused the tax-payer retained the coupons and brought trespass in the circuit court of the United States and recovered back in damages the tax paid by the levy. The State, paying these judgments for her officers, was without tax paid either in money or coupons; and the right of the State to these coupons so tendered and taken back has been denied and none have ever been delivered by such tax-payers.

It is obvious that in this state of things the same coupon might serve as a tender for many tax-payers in fraud of the right of the State to have her taxes paid in money or in these coupons.

To avoid all this—to compel the tax-payer to pay in conpons what tax he refused to pay in money, to verify the genuineness of the coupons tendered, and to forbear the *ex parte* procedure by levy—the statute of May 12, 1887, was passed.

On its face, in its preamble, in the procedure provided,

there is no taint of unconstitutionality, according to the rulings of this Court.

1st. It cannot be held to be unconstitutional for a State to provide for suits by itself, in its own courts, against citizens who have not paid their taxes, and a trial by jury to test the claim.

In Murray *vs.* Hoboken, 18 How., 272, this Court decided that a summary proceeding against collectors was "due process of law," against the contention that those famous words required trial by jury on a deprivation of property, but no one was heard to deny that if judicial procedure and jury trial were secured there could be any constitutional objection.

"It is competent for the United States to sue any of its debtors in a court of law," per Curtis, J., p. 283. To deny this competency would be to take from a sovereign what is the privilege of its poorest citizen. It is an essential function of every government; it cannot be denied to a State. If it can levy without judgment it must be competent to sue in order to obtain judgment. If it can seize the property of a citizen without hearing it must have right to give him a hearing before seizure. (See Collector *vs.* Daly, 11 Wall., 113; Antoni *vs.* Greenhow, 107 U. S., 769).

2d. There is not one clause in said act which denies the right of tender of genuine coupons, but everything to conserve it. The three things the State aims at are to test the *bona fides* of the tender by requiring defendant, with his plea, to produce them and hand them over for the canceling officer of the Government; to require proof of genuineness of the papers tendered, and, in default of all this, to get judgment for unpaid taxes.

The preamble speaks of the tender of papers purporting to be genuine coupons; the first and fifth sections do the same. The eleventh section speaks of a tender otherwise

than for identification and verification. This shows a purpose to guard itself against spurious coupons.

To test the *bona fides* of tender the fifth section provides for their production and proof of tender. *Prist et tout prist.* It is what Waite, C. J., means in Antoni *vs.* Greenhow, 107 U. S., 774, when he speaks of the tender being "*kept good*"—that is, not merely offered, but kept for the State *bona fide* as the tax due to it, and not as a shallow device to make ground for a suit in trespass if a levy be made, or to avoid paying taxes altogether. (See Bissell *vs.* Hayward, 96 U. S., 580.)

The tender of genuine coupons being proved, the act, section 5, declares judgment shall be for defendant on the plea of tender, and the claim is discharged. This gives the tax-payer his whole right.

If he fails on his plea of tender, then judgment is rendered for the tax.

In Antoni *vs.* Greenhow, *supra*, the court held the law of Virginia which required the delivery of the coupons for verification and the payment in money of the tax, and a suit by tax-payer against the State to get his money back, without costs on his success, to be constitutional.

In this law he prepays no money, he keeps his coupons, he is put to no suit against the State to get his money back, but he stands on the defensive—is sued by the State, pleads his tender, and, if proved, pays no money and is discharged of taxes by the payment of them in these coupons. It is true, he recovers no costs, and neither does the United States or any other Government allow them to a successful suitor.

The United States requires prepayment of a tax claimed to be illegal and compels the tax-payer to sue to recover it back.

Something is said about this law being a part of previous laws passed, which required the production of the bond and excluding the testimony of experts. It is enough to say here that if these previous laws are applicable to suits under

the act of 1887 and are unconstitutional, and should be applied by the courts to these cases, the remedy by writ of error is adequate; and, again, that this Court will not impute *in prospectu* any unconstitutional ruling by these courts, and that there is nothing in this law as to these suits which hints at any such evidence being required on the one hand or excluded on the other. To pronounce a law unconstitutional because, in its adjudication, unconstitutional decisions may be made is premature, and has never been the rule of this Court in its relations to other courts over whose action it takes appellate supervision.

VII.

This is a suit in fact against the State of Virginia and all proceedings are null and void.

It makes the attorney general and all attorneys for the Commonwealth parties defendant as such officers. It compels them, not as ministerial but as discretionary officers, to regulate their official action by the will of a Federal judge. It takes them away from their duties and imprisons them until they surrender the suits and judgments of the State, and compels the State into the alternative of accepting what is tendered in taxes, whether spurious or not, or taking nothing. It has driven the State from levy for her taxes and now seeks to exclude her from her own courts as a suitor.

If this is not a breach upon the immunity of the State under the Eleventh Amendment, what is its value?

An historic epitome of the proposal and adoption of this amendment is pertinent to this inquiry.

Alexander Hamilton in the 81st number of the Federalist discusses the question whether a State can be sued in the Federal courts by a citizen of another State. (He seems to treat the possibility of her being sued by one of her own citizens as too remote even for hypothesis.)

He declares the fear of such a construction is chimerical.

But within a few years after the Government went into operation the Supreme Court, in Chisholm *vs.* Georgia, 2 Dall., 419, entered judgment for a citizen against a State. Many such suits were pending in this Court, most of them, perhaps all, by citizens of another State against one of the States. The original records in this Court show the following: Huger *vs.* South Carolina, Oswald *vs.* New York, Vassall *vs.* Massachusetts, Von Stophust *vs.* Maryland, Cutting *vs.* South Carolina, Hollingsworth *vs.* Virginia, Grayson *vs.* Virginia.

The judgment in Chisholm *vs.* Georgia was rendered on the 18th of February, 1793.

Great alarm was produced among the States by this decision, and on the 20th of February, 1793, an amendment was proposed in the Senate of the United States which read—

"The judicial power shall not extend," &c. (See Annals of Congress, 651.)

Its consideration was delayed until January 21, 1794, when it had assumed the form it now has.

"The judicial power shall *not be construed* to extend," &c. (Annals of Congress, p. 25.)

Mr. Gallatin (p. 30) proposed an amendment, "Except in cases arising under treaties made under the authority of the United States."

This was voted down.

On the same day an amendment was proposed so that the article would read thus—

"The judicial power of the United States extends to all cases in law or equity in which one of the United States is a party, but none shall be prosecuted where the cause of action shall have arisen before the ratification of this amendment."

This was voted down.

The amendment as finally adopted was then passed—ayes, 23; noes, 2.

The amendment went to the House of Representatives.

An amendment was proposed (Ann. of Cong., 476, '77) in these words: "When each State shall have previously made provision in their own courts whereby such suit may be prosecuted to effect."

Voted down—ayes, 8; noes, 77.

The Eleventh Amendment was then adopted—ayes, 81; noes, 9.

It may be well to notice that on the 2d March, 1793, the act passed Congress which forbade injunctions by a Federal court to stay proceedings in a State court.

The amendment was ratified in 1798.

In Grayson *vs.* Virginia, 3 Dall., 320, this Court directed process against Virginia to be served on the Governor and *attorney general* of the State.

In Hollingsworth *vs.* Virginia, 3 Dall., 378, the Court unanimously dismissed all pending suits against States on its docket as being forbidden by the Eleventh Amendment.

This historic statement justifies the following conclusions:

1. It shows that by the Constitution makers it was ordained that the original Constitution *should not be construed* (as it had been in Chisholm *vs.* Georgia) to extend to any suit by a citizen of one State, or foreign subjects against a State.

2. If any of these suits were those of citizens against his own State (as it may have been from the names of the plaintiffs in Huger *vs.* South Carolina and Grayson *vs.* Virginia), they, with those against a State by parties not citizens thereof, were equally condemned by this amendment.

This amendment is an authoritative interpretation of the original Constitution. It was an imperative mandate to the judiciary not to construe their jurisdiction so as to entertain such suits. It was a recoil from such a construction in the interests of the immunity of a member of the Union from being impleaded in a Federal court by any person whatever.

How, then, should this amendment be construed by this Court now?

The answer seems plain. It should be interpreted in favor of the immunity, and to defeat every device which would destroy or impair it. The Court should not see how near an approach a suit may make to the fences which constitute the immunity, but how far it must keep away, lest it trench upon the sovereignty of the State. Devices which do not assail directly, but which furtively and adroitly avoid the thing forbidden in form, but do the thing substantially and in effect, must be condemned as contrary to its true purpose and meaning.

We hold that this is an injunction against the State in fact—

1st. Because, as already indicated, it destroys an essential function of State autonomy—*the power to sue its debtor in its own court and by its own officers.* It imprisons them for asserting her right as her law officers. Collector *vs.* Daly (11 Wall., 113) is conclusive on this point.

If the State can *only* sue by such professional attorneys, is not an injunction upon the only possible agency through which the invisible, immaterial State can act a clear destruction *pro tanto* of State autonomy? As you cannot enjoin a State from suing—as you cannot serve the injunction, if you could do so, on an invisible and intangible entity, as it can only exert this function by human agencies—can there be a doubt that in cutting these off you leave the State maimed and helpless, a sovereign without will and without capacity to act? In fact it is obvious that to constrain her you must constrain these agencies, the *sine qua non* of her action; and, if this be so, how is this amendment of avail if, unable to touch her, you cut off her only means of acting?

2d. In suing her executive officer, the attorney general (on whom, as a representative of the State, in Grayson *vs.* Virginia, this Court ordered process against her to be served), you sue her—you enjoin her.

In the Virginia cases (100 U. S., 303–370) this Court held

that every officer of a State who acted for her in the execution of her laws was the State under the Fourteenth Amendment. Shall she be bound for their act and yet their act not be hers under the immunity of the Eleventh Amendment?

Suppose an injunction was granted against the Attorney General and all district attorneys of the United States to prevent suits in the name of the United States, could there be a doubt that would be an injunction to the Government? See U. S. *vs.* McLean, 4 How., 286. Hill *vs.* U. S., 9 How., 386. Mississippi *vs.* Johnson, 4 Wall., 475. Georgia *vs.* Stanton, 6 Wall., 50.

3d. This decree interferes with the discretion of these officers, and they are not merely ministerial officers.

Let it be remembered, no suit is ordered under this law against any man *who has paid his taxes.* The law is explicit on this point.

The attorney general and other attorneys are discretionary officers, charged with functions which demand intelligent discretion. In such cases they are held to be the *State.* See Board of Liquidation *vs.* McComb, 92 U. S., 531; Cunningham *vs.* R. R. Co., 109 U. S., 446, and cases reviewed.

Where the mind and will of the State (the invisible sovereign) operate through the mind and will and according to the discretion of its officers they are the State and must be so held or the Eleventh Amendment means nothing.

So in Louisiana *vs.* Jurnel, 107 U. S., 711; Antoni *vs.* Greenhow, *ib.*, 769; Hagood *vs.* Southern, 117 U. S., 52.

This last case is very pertinent, for the suit and decree were against the officers in their official capacity and operated on their discretion.

4th. The coupon cases (114 U. S., 269) are cited against the views presented.

In these cases the majority of the court based their conclusions on several grounds:

1. The officer was ministerial, but in this case there is discretion.

2. In that case there was actual taking of property, which was trespass unless justified by *respondeat superior*, which was denied him.

In that case the officer seized and held property. In this case he holds and has seized none; he only sues one who is a confessed debtor, but if he did not so confess, merely suing is no trespass and no invasion of right which a valid plea at law will redress.

The officer in that case might, *ex mero mutio*, have trespassed. Here the attorney cannot, for there is no trespass, and he has no interest and takes none.

3. In that case the officer made the aggression on the citizen, for which the court held he should have redress. In this case he makes none; he summons him who is a debtor to try whether he ought on his tender to be discharged.

Clearly the coupon cases do not govern this. This strikes at the very citadel of the State's immunity. A levy without right is trespass. A suit without good ground is not a wrong of which a party can complain if his defense is allowed, for which he can enjoin. Virginia has a right to sue, giving her citizens a fair trial, and doing so neither she nor her officers can be enjoined.

VIII.

The prisoners must be discharged upon either of two grounds—

1. If the Court, on any ground previously maintained, was without jurisdiction or transcended its jurisdiction (as in the imprisonment until the prisoner did the impossible or improper thing) this Court will discharge. (*Ex parte* Parks, 93

U. S., 23; *Ex parte* Wilson, 114 U. S., 417; *Ex parte* Curtis, 106 U. S., 371; *Ex parte* Carll, *id.*, 521; *Ex parte* Bigelow, 113 U. S., 328; *Ex parte* Fish, *id.*, 713; *Ex parte* Yarbrough, 110 U. S., 681; *Ex parte* Virginia, 100 U. S., 343; *Ex parte* Siebold, 100 U. S., 371; *Ex parte* Harding, 120 U. S., 782; *Ex parte* Bain, 121 U. S., 1.)

2. In a case where this Court has appellate power ultimately, on final decree and on interlocutory proceedings, liberty is unjustly taken away and contrary to equity, but within jurisdictional power, we insist that there is no good reason why, *in favorem libertates*, this Court should not grant release under *habeas corpus*. If not, the deprivation might continue until the final decree.

PETITIONERS, BY THEIR COUNSEL.

C. V. MEREDITH,
W. W. GORDON,
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IN THE

Supreme Court of the United States.

EX PARTE RUFUS A. AYERS.

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BRIEF OF C. V. MEREDITH, FOR PETITIONERS.

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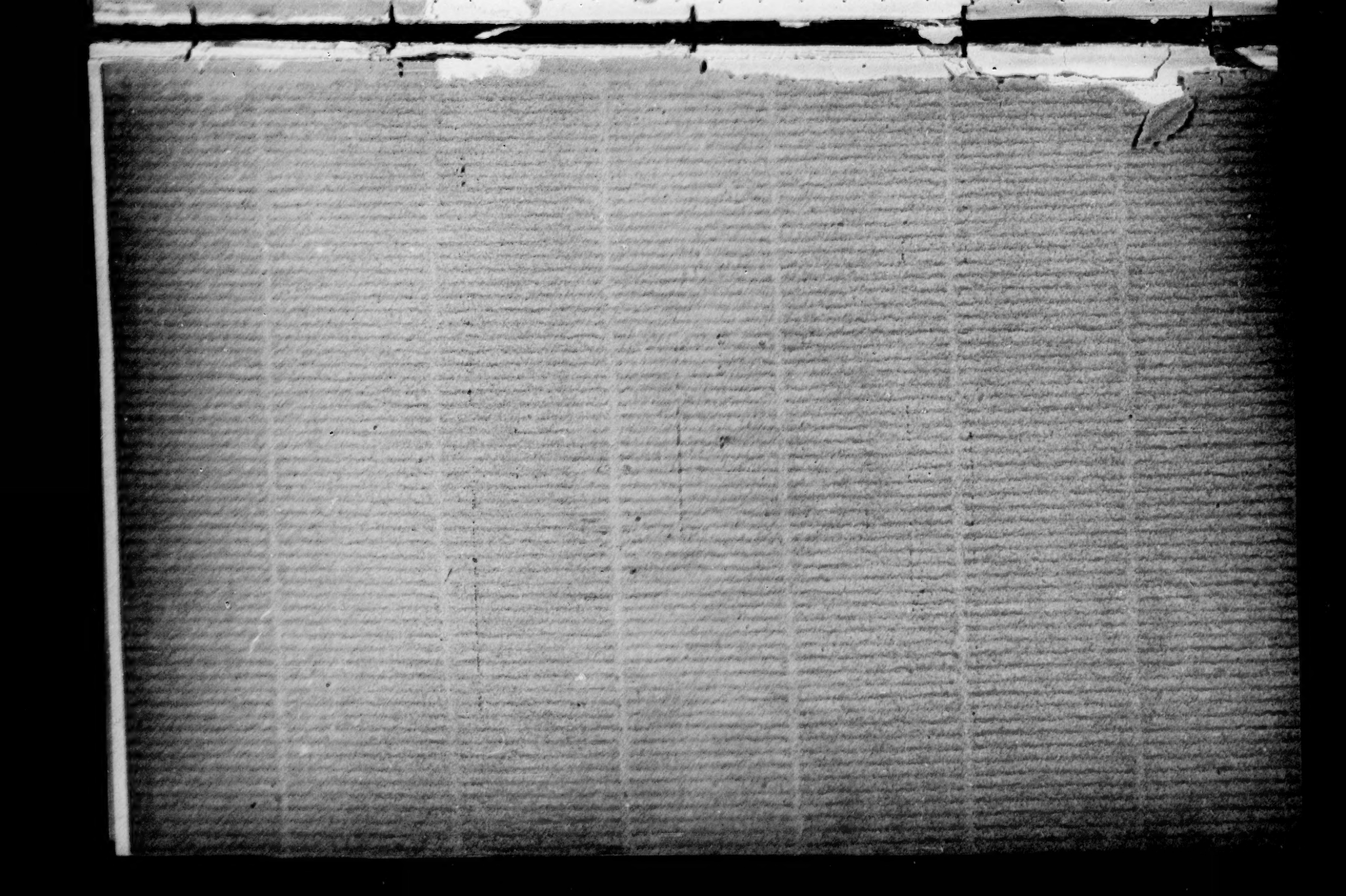

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STATEMENT.

Each of the above named petitioners prays to be discharged upon a writ of *habeas corpus*, because they insist that they are illegally held under certain orders entered on the 8th day of October, 1887, by the judge of the United States Circuit Court for the Eastern District of Virginia. The legal grounds for each of the three petitions are so nearly similar, that all three of the cases will be argued as one in this brief; which, it is hoped, will be treated as a brief for each petitioner in his respective case.

Under an act of her General Assembly, passed March 30, 1871, the State of Virginia issued to her creditors certain bonds, having attached thereto interest coupons. The coupons, in accordance with said act, state upon their face that they are receivable by said State in payment of all taxes, debts and demands due to her. Under another act passed March 28, 1879, another series of bonds were issued, having like interest coupons attached. The said acts

required that the bonds should be signed by the State Treasurer and Second Auditor, but that the coupons need not be so actually signed, if said signatures were engraved or lithographed thereon. By another act of January 14, 1882, the State alleged the existence of many spurious or counterfeit coupons, and forbade her officers to receive any coupons in payment of taxes, except in accordance with other provisions of the act providing for a determination by a jury of their genuineness. Such a requirement was decided by this Court in Antoni vs. Greenhow, 107 U. S., p. 769, to be within the power of the State. On May 12, 1887, the State passed another act, which in substance is as follows:

First section. That all taxes, including taxes on licenses, now due, or which may hereafter become due to the Commonwealth, in payment of which any paper or instrument purporting to be a coupon detached from a bond of this State shall have been or may hereafter be tendered and not accepted as payment, *and not otherwise paid*, may be recovered in the Circuit Court having jurisdiction over the county or corporation in which said taxes shall have been assessed, or if the tender was made to the Auditor of Public Accounts in payment of taxes, which he is authorized by law to receive, the said taxes may be recovered in the Circuit Court of the city of Richmond."

Second section gives the Court jurisdiction without regard to the amount involved.

Third, allows the proceeding to be by motion upon ten days notice—and authorizes Attorneys for the Commonwealth to institute the same.

Fourth, provides for serving the notice upon different parties, and allows the Attorney for the Commonwealth to exercise his discretion, as to serving the notice on the tax-payer, or his agent.

Fifth, "The motion may be tried or heard by the Court or jury as motions in other civil cases. If the defendant relies on a tender of coupons, as payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered, and the clerk shall carefully preserve them. Upon such plea filed the burden of proving the tender and the genuineness of the coupons shall be on the defendant. If the tender and the genuineness of the coupons be established, *judgment shall be for the defendant on the plea of tender.* In such case the clerk shall write the word 'proved,' and thereunder

his name in his official character across the face of the coupons, and transmit them, together with a certificate of the Court, that they have been proven in the case, to the Auditor of Public Accounts, who shall deliver the coupons to the Second Auditor," &c., &c.

Sixth, If the defendant fail in his defence, then judgment is to be given against him for taxes, interest, and costs.

Seventh, The judgment is not to merge any antecedent lien for the taxes.

Eighth, Every such judgment to be docketed, and execution on each to be issued.

Ninth, If coupons are tendered in payment of said execution, then a suit is to be instituted on said judgment and proceedings to be had in accordance with the fifth section.

Tenth, Auditor to keep a record of all such judgments.

Eleventh, County Treasurers to report to Commonwealth's Attorneys and the Auditor of the State, all tax-payers who have tendered coupons.

Twelfth, Commonwealth's Attorneys and the Attorney-General, "upon such report being made to them, or whenever they are otherwise informed, of any such tender having been made," to institute the proceedings.

Thirteenth, When judgment for Commonwealth, costs and a fee for the State counsel to be taxed.

Fourteenth, A fine to be imposed upon any officer failing to perform duties required by the act.

After the passage of the last named act, to-wit, on June 6th, 1887, certain parties filed in the United States Circuit Court for the Eastern District of Virginia a bill of complaint. The bill alleged the passage of the act above mentioned—that this Court had held in Poindexter vs. Greenhow, 107 U. S., p. —, that a tender of coupons to a tax-collector paid the tax—"so as to deprive the Legislature of power to cause that tax-payer to be thereafter molested in respect to said tax;" that relying on that decision, the complainant bought $100,000 of coupons for about $30,000 in money, so as to make money by selling them to tax-payers; that they had sold many of them to tax-payers; that the act of May 12th, 1887, is unconstitutional; that by another act, passed January 26th, 1886, the tax-payer, upon the trial of the issue made up under the act of May 12th, 1887, is required to produce the bond from which the coupons were cut; that it is almost impossible to do so; that by

another act, passed January 21st, 1886, the tax-payer, upon the trial of the same issue, is not allowed to introduce expert testimony to prove the genuineness of the coupons; that thus the tax-payer is required, by the act of May 12th, 1887, to prove a thing, as to which effectual precautions have been taken beforehand, to prevent him from proving; that most of the tax-payers pay very small sums as taxes, and cannot afford such law suits; that the Supreme Court of Virginia has held the acts of January 26th and January 21st, 1886, to be constitutional and binding; that there are about one hundred Treasurers and Commonwealth's Attorneys in the State, and that they are about to proceed to carry out the requirements of the act of May 12th, 1887; that if not prevented, the complainants will be unable to sell their coupons to tax-payers; that the complainants are remediless save in a court of equity.

The complainants then pray as follows: "Your orators therefore pray, that the said Morton Marye, Auditor of Virginia; R. A. Ayers, the Attorney-General thereof, and the Treasurer and Commonwealth's Attorney of each county, city, and town in the State of Virginia may be made parties defendant hereto, and that they, their agents and attorneys, may be restrained and enjoined from bringing or commencing *any suit*, provided for by said act of May 12th, 1887, or from doing any other act to put said statute into force and effect, and that until the hearing of a motion for said injunction, a restraining order may be made to that effect." Then follows prayer for general relief.

On June 6, 1887, the restraining order, prayed for, was awarded. A copy thereof was served on two of the petitioners—Rufus A. Ayers and John Scott. A copy was not served on J. B. McCabe, for the reason that he was not, at the time the order was entered, Commonwealth's Attorney of Loudoun county; but a copy had been served on his predecessor in office.

On the 30th day of June, 1886, Rufus A. Ayers, believing the Court to be without jurisdiction, disregarded said order, and acting under the statute of May 12th, 1887, served a notice upon the Baltimore and Ohio Railroad Company.

On July 1st, 1887, said J. B. McCabe served similar notices on several tax-payers.

On July 28th, 1887, the same complainants filed an amended bill, which contains about the same allegations as the original bill, except that it charges that it the act of May 12, 1886, is enforced "reclama-

tions" by tax-payers, to whom they sold coupons, will be made upon them to the extent of $2,000; and in the prayer that Marye, Ayers, the Treasurers and Commonwealth's Attorneys are alleged to be citizens of Virginia.

On August 16th, John Scott, one of the petitioners in this Court, served several notices on different tax-payers under said act of May 12th, 1887. The complainants afterwards filed two other amended bills, but they are immaterial as to the controversy here.

On October 7th, 1887, the Judge of said United States Circuit Court delivered an opinion, in which it was decided that the act of May 12th, 1887, was unconstitutional and void, and that the injunction prayed for would be granted. The opinion is a part of the records in these proceedings. On the next day the said Judge entered an order holding said Ayers guilty of contempt, and imposed upon him a fine of $500, and that he stand committed until the fine be paid; and he purge himself of contempt by dismissing the said proceeding against the B. & O. R. R. Co.; also, an order holding said McCabe guilty of contempt, and imposed upon him a fine of $100, and that he stand committed until he dismiss the proceedings instituted by him; also, an order holding said Scott guilty of contempt, and imposed upon him a fine of $10, and that he stand committed until he shall have marked satisfied the judgments had upon the proceedings instituted by him.

The petitioners were thereupon committed to the city jail in Richmond, Virginia, and remained there until brought here upon writs of habeas corpus.

In the lower court the respondents filed no answers to the bills. The cause was heard upon demurrer.

ARGUMENT.

EFFECT OF STANDING UPON DEMURRER.

While the general rule is, that a demurrer admits, as true, all the allegations in the bill, yet that rule does not embrace statements made as to the meaning of papers, filed with or referred to in the bill. A demurrer does not admit as true such statements, and the court will construe for itself the papers. Hitchcock vs. Buchanan, 105 U. S., pages 417–8. Hence the demurrer in this case does not admit as true the constructions put by the complainants upon the decisions of this court, or upon the Virginia statutes.

NATURE OF REMEDY BY HABEAS CORPUS.

The petitioner is only required to show that the lower court had no power to enter the order complained of. The court may have had full jurisdiction over the parties to, and the subject matter of, the suit, yet, if it had no power to enter the specific order complained of, that unauthorized use of power can be examined into, upon a writ of habeas corpus. *Ex parte* Fisk, 113 U. S., 713. Such a writ is not regarded as an attack upon an order or judgment in one suit, by proceedings in another suit. But it is looked upon as an attack made upon the void judgment or order in the same suit. In other words a proceedings before this Court by writ of habeas corpus is in its nature an appellate proceedings. *Ex parte* Virginia, 100 U. S., 339–41.

In *ex parte* Rowland, 104 U. S., 264, it is said: "But if the command was in whole or *in part* beyond the power of the court, the writ, or *so much* as was in excess of jurisdiction, was void, and the court had no right to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this Court."

The petitioners in these proceedings have then only to show that the lower court had no power to enter the restraining order of June 6th, 1887. Hence we submit that the Court had no authority to enter said order.

1st. Because the statute of May 12th, 1887, is not unconstitutional.

2d. Because it is a suit against the State.

3d. Because the bill does not show sufficient equities to authorize the injunction.

I.

THE STATUTE NOT UNCONSTITUTIONAL.

It appears from the opinion of the Judge in the lower court, filed in this record, that he held the said statute to be unconstitutional, because the remedy granted under it was destroyed by the acts of January 21st and 26th, 1886. On the other hand, in claiming that the said statute is not unconstitutional, we insist—

First, That the said two acts do not destroy the remedy intended to be had under the said statute.

Second, That if they do apply, yet being valid acts, they could not make another law unconstitutional.

Third, That the statute is only a legitimate change of remedy.

Discussing these positions in the order, in which they are stated, we ask, in order that the Court may see that the Acts of January 21st and 26th, do not apply to an issue had under the Statute of May 12, 1887, that the Court will notice the relative positions of the State and the tax-payer in a suit brought under said Statute. The State is *plaintiff* and the tax-payer is the *defendant.* Under the said Statute such are their relative positions *for the first time* in any proceeding growing out of the tender of coupons. Before the passage of that Statute in all such suits the tax-payer had been the plaintiff and the State the defendant. See Antoni v. Greenhow, 107 U. S., 769, and Poindexter v. Greenhow, 114 U. S., p. 247. Such being the fact, the question is apt to occur, whether Acts passed prior to the Statute of May 12, 1887, would apply to suits where the relative positions of the parties had been so materially changed. An examination of the Acts of January 21st and 26th, 1886, the two Acts complained of will show that they do not apply.

Before quoting those Statutes, we submit that the following is the proper rule for their construction:

"A Statute ought not to be so construed as to subvert the rights to property, unless such an intention be expressed in terms that admit of no doubt." Rutherford vs. Green, 2 Wheat, 196.

"If the language of a Statute is fairly susceptible of two constructions, both equally obvious and reasonable, one of which will bring it into harmony with the constitution, while under the other it is invalid, the former construction is to be adopted." Supervisors vs. Brogden, 112 U. S., 261.

The act of January 26th, 1886, reads as follows:

"That in the trial of any issue involving the genuineness of a coupon, appearing or purporting to have been cut from any bond authorized by law to be issued by the State of Virginia, or by any city, county or corporation, the DEFENDANT may demand the production of the bond; and thereupon it shall be the duty of the plaintiff to produce such bond," &c.

If that act has any effect upon the Statute of May 12, 1887, how can it injure the tax-payer in an issue had under the said statute. In such an issue the tax-payer is the "defendant." If the demand for the bond would injure him, he need only keep quiet about it. No one else in such issue could demand the production of bond, for no one else would be the "defendant," and no one but the "defendant" is authorized to make such a demand. It is indeed a curious fancy for a tax-payer to imagine that in the trial of an issue had under the Statute of May 12, 1887, the above quoted act could hurt him. For in truth only a cursory reading ought to satisfy him, that the dreaded act, if it applies at all, is really beneficial. Under the proposed issue, the tax-payer is required to prove the genuineness of the coupon, and by the above quoted act he is relieved of all trouble. For the tax-payer being the "defendant," is authorized to demand the production of the bond, and the State, being "the plaintiff," is required to produce it. Under such circumstances his imagined evil becomes an unappreciated blessing. What more can he ask? He is allowed to make the State furnish the necessary proof. It must be evident that act of January 26, 1886, instead of making the Statute of May 12, 1887, unconstitutional, tends most strongly to show that its requirements are not burdensome, but fair and easy to be borne.

If this construction of said act is not correct, then we submit, that, if it be not beneficial, it is at least inocuous. For its very language prevents the State from requiring of the tax-payer the production of the bond in an issue under the said Statute of May 12th. No one but "the defendant" can demand the production of the bond. The State is no longer "the defendant."

But even if the said act of January 26, does apply to an issue had under the said Statute of May 12, yet it cannot make the said statute unconstitutional. The State has a right to demand the production of the bond. Beers vs. Arkansas, 20 How., 527; Bank of Washington vs. Same, 20 How., 530. The exercise of a right cannot make a statute unconstitutional. The said act of January 26, has no such effect upon the said Statute of May 12.

Since no just complaint can be made against the act of January 26, 1886, let us see whether the act of January 21, 1886, makes the requirements of the 5th section of the Statute of May 12, 1887, so grievous as to be unconstitutional.

The act of January 21st, reads as follows:

"Where a bill, declaration, petition, or other pleading alleges that *any person* made, endorsed, assigned, or accepted any writing, no proof of the *handwriting of* such person shall be required, unless the fact be denied by affidavit, with the answer, plea, or other pleadings which puts it in issue: provided, that no such affidavit shall be required, where the *signature* of the maker, endorser, assigner, or acceptor of any paper is not in the *personal handwriting* of the party to be charged, or his agent, but was made by machinery, or in any other manner than by the actual or personal handwriting of the party to be charged, or his agent, then in all such cases the burden of approving such paper to be genuine shall be upon the party relying upon the paper so offered to be read in evidence: and it is further provided, that expert evidence shall not be received to prove the genuineness of any paper or instrument made by machinery, or in any other manner than by the actual or personal handwriting of the person to be charged, or his agent."

It is evident that it is in the latter part of the act, that the complainants in their bill found their grievance. It lies in the last proviso, if at all. We insist that the act does not affect them in an issue under the said statute of May 12th. We submit that a proviso in a statute only refers to that class of cases embraced in the general clause.

"Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause, which does not fall fairly within its terms. In short, a proviso carves *special exceptions only* out of the enacting clause," &c. United States vs. Dickson, 15 Peters, 141 and 165.

In the light of that rule, can the proviso complained of apply to the State coupons? They are not specifically mentioned. Are they embraced in the language of the proviso, when the "proviso carves special exceptions *only* out of the general clause"? Does the general clause embrace State coupons? We submit that it does not. The State is not a "person". See Code of Va., 1873, p. 105, section 13. A State is never embraced in a statute, unless the intent to do so is clearly manifest. As the general clause does not embrace State coupons, then by the rule above quoted the proviso does not include them.

In reply to the above position, it may be urged that the decisions

of the Supreme Court of Virginia in Cornwall vs. State, (Va. Law Journal,) February, 1887, settled the question that the proviso does apply to Virginia coupons. We submit that that case does not decide that question. That Court has never been called upon to decide that question, for it has never been raised before it. The question not being raised, the Court treated the proviso as applying to Virginia coupons, and decided the only question raised before it, viz: whether the proviso was constitutional.

But if this Court shall regard that decision as binding, then we further insist that the proviso does not apply, for the reason that like the "general clause," it was only intended to apply to cases where the *plaintiff* filed the paper in dispute, and not to cases where the *defendant* filed it. If the words "or other pleading" did not follow the word "petition," the act would show upon its face that it only applied to a case where the *plaintiff* filed the paper. It would then read "where a *bill*, *declaration*, *petition* alleges," &c. Each of those words shows that the statute was drawn with reference to a paper filed by the plaintiff, and not by the defendant. The statute expects the defendant to deny the genuineness of the paper—and therefore, it could not have been intended to apply to a case where the defendant files the paper. The presence however of the words "or other pleading" after the word "petition," raises the only doubt as to the correctness of the above construction. Those general words should be construed by the principle of "*ejusdem generis.*" That principle is recognized in Virginia for the construction of Virginia statutes. City of Lynchburg vs. N. & W. R. R. Co., 80 Va., 237. Those general words are only intended to embrace words of a character, similar to the antecedent specific ones. Then the words, "other pleading" refer only to such pleadings as are similar in their nature to a declaration, bill or petition. Hence the act was intended to apply to only those cases, in which the plaintiff files the note or evidence of indebtedness.

In support of this construction of the act, we do not rely solely upon the principle of *ejusdem generis.* An examination of the history of the statute will show that our construction is correct, and that the application of the rule of "*ejusdem generis*" would be most proper.

The act had its origin in an act of February 5, 1828, Supp. Rev. Code of Va., chap. 206, p. 265. This original act specifically speaks

of the "plaintiff" filing the evidence of indebtedness, and the "defendant" filing the affidavit. Hence it is evident that, originally, the act was intended to apply only to a case where the "plaintiff" files the paper.

This original act was construed in Shepherd, &c., vs. Frys, 3 Grat., 442–444. Here the Supreme Court of Virginia said:

"The object of the act, &c., was, in actions on writings not under seal, to *relieve* the *plaintiff*, not absolutely, but conditionally, from the necessity of proving at the trial the genuineness of the instrument on which the action is founded * * *. It therefore precludes the *defendant* from controverting the genuineness of the instrument, unless he denies it by an affidavit with his *plea*."

That decision recognized two facts: First, that the statute only applied to a case where a "plaintiff" filed the paper. Second, that without the statute, the party offering the paper had, at common law, to bear the burden of proving its genuineness.

Such being the meaning of the original act, has that meaning been changed in its different modifications? It was first modified in Code of Va., 1849, p. 651, § 38. The modified act speaks of a paper filed with the "declaration or *other pleading*." There appears for the first time the words "other pleading." And we call attention to the fact that along with this first appearance goes also an explanation of what those words were intended to mean. For we find that it is immediately followed by a requirement that the affidavit is to accompany the "PLEA." No one but a defendant can file a "plea." Hence the statute applies to a case where the *plaintiff* files the paper, and the *defendant* files the "plea." Hence the words "other pleading" were intended to mean "pleading" in the nature of a declaration. Hence we have established as early as 1849 the meaning of the words "or other pleading." Unless there can be found in the subsequent modifications of the act, some evident intent to change that meaning, the same meaning should be given to those words in the present statute.

The next amendment was made in Acts 1869–70, chap. 271, p. 423.

This amended act speaks of the paper being filed with a "*bill*, declaration or other pleading," and the affidavit being filed with the "*answer*, plea or other pleading." That alteration gives no indication of any intent to change the meaning of the words "other pleading," as intended in 1849. On the other hand, the addition of

the word "bill" to the words "declaration or other pleading," and the addition of the word "answer" to the word "plea" only strengthens our construction. The addition of the words "other pleading" after the word "plea" does not in the slightest affect that construction. It only shows that the words "or other pleading" were intended to be construed by the rule of "*ejusdem generis.*"

Coming to the last amendment of the act, namely, the act under consideration, we find that the only change in the general clause of the act is the addition of the word "petition" to the words "bill, declaration or other pleading." Surely such an addition, instead of weakening our construction, only shows that we have rightly stated the purport of the act.

We insist, then, that guided by the rule of *ejusdem generis*, and also by the history of the act, this Court can have no difficulty in declaring that the act of January 21st, 1887, was only intended to apply to a case where *the plaintiff filed the paper in dispute.* This determination cannot be affected by the case of Cornwall vs. State, *supra*, because, in that case, the tax-payer was the *plaintiff*, and as such filed the paper. Under the act of May 12th, 1887, he would be the defendant. Such is the difference, that prevents that case from being an authority in point.

In the light of the above, we submit, that the act of January 21st, 1886, can have no bearing or effect whatever, upon a trial, arising under the statute of May 12th, 1887, in which the *defendant* files the paper.

But suppose that the act of January 21st, 1886, does apply to an issue, had under the statute of May 12th, 1887. Still we insist, that it cannot have the effect of making the latter unconstitutional. It is contended by the complainants that the statute of May 12th required the tax-payer to prove the genuineness of the coupons, and that, at the same time, he is prevented from so doing by being deprived of expert testimony by the act of January 21st, 1886. Our reply is—

1st. That the burden of proving the genuineness of the coupons tennered was always upon the tax-payer.

2d. That, at the times at which the State issued her coupons, the laws of Virginia did not allow the use of expert testimony for such a purpose.

3d. That the act of January 21st, 1886, does not deprive the tax-payer of the use of expert testimony.

BURDEN OF PROVING GENUINENESS.

The act of 1869–70, as it remained, until the act of January 21st, 1886, never applied to coupons. It only applied to papers in the "personal handwriting" of some "person." Coupons are not such papers. Hence, not coming within the purview of the act of 1869–70, the burden of proving the genuineness of the paper was upon the person tendering it. This is a common law burden, as was recognized in Shepherd, &c., vs, Frys, *supra*. Such being the case, the requirement of the said act of January 21st, placing the burden of proof, is only declaratory of the common law, as it existed at the time the act was passed. Hence the requirement is unobjectionable.

EXPERT TESTIMONY NEVER ALLOWED.

The complainants, in the bill in the record, refer to neither a statute of Virginia, nor to any rule of the common law, entitling them to expert testimony to prove the genuineness of coupons. If in their complaint they meant by expert testimony the testimony of persons who would swear to the genuineness of coupons by comparison of them with others that they had seen, we have only to say that they were never entitled to such testimony. In Rout's adm'x vs. Rile's adm'r, 1 Leigh, 216–223, the Supreme Court of Virginia held that handwriting could not be proved by comparison by one *who had never seen the party write.* See, also, Strother vs. Lucas, 6 Peters, 763.

If such was the rule in Virginia as to handwriting, which has characteristics, or an individuality about it, the same rule applied to engraved coupons, whose peculiarities are no more marked. The Supreme Court of Virginia, in Hanriot vs. Sherwood, in Va. Law Journal, 1884, p. 107, discussed fully the use of experts in proving handwriting. In that case it is stated that the first time expert testimony by comparison, as to handwriting, was ever recognized in Virginia, was in Burruss' case, 27 Gratt., 934, decided in January, 1876. Such being the law of Virginia upon expert testimony, we submit, that the coupon-holders have no right to complain of the act of January 21st, 1886. No right is taken away, that they ever had.

EXPERT TESTIMONY ALLOWED.

But suppose that expert testimony was admissable, when the coupons were issued, yet the right to use such testimony does not form a part of the obligation of the contract.

"It is also evident that the right to have one's controversies determined by existing rules of evidence is not a vested right. Cooley Con. Limitations [*367]. Ogden vs. Saunders, 12 Wheat., 350, 351, 369. Black's Con. Prob., § 202.

The State has a perfect right to change at any time its rules of evidence, unless the change works a destruction of the contract. Here the change produces no such effect. The tax-payer is left a fair opportunity to prove the genuineness of his coupons by proper expert testimony. For while a comparison of handwriting could not formerly be proved by experts, yet the rule has always been that a comparison might be made *by the court or jury*.

"The rule as to the comparison of handwriting applies to witnesses who can only compare a writing, to which they are examined, with the character of the handwriting impressed upon their own minds; but that rule does not apply *to the court or jury*, who may compare the two documents, when they are properly in evidence." Griffith vs. Williams, 1 Comp. vs. Jerv., p. *47.

"But the general rule of common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is that if a paper, admitted to be in the handwriting of a party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question *may be compared by the jury*." Moore vs. United States, 91 U. S., 270.

Such being the settled rule, all that the tax-payer would have to do would be to get before the jury coupons, admitted or proven to be genuine, and then he would have evidence to establish their genuineness, if genuine. We insist that the tax-payer would have no difficulty in getting before the jury genuine coupons, with which the jury could make a comparison.

Under the decision of Hanriot vs. Sherwood, *supra*, he would, for the purpose of proving the genuineness of his coupons, have the right to introduce in evidence papers which would otherwise be irrelevant to the issue. Under that decision they could introduce

a bond of the State with coupons attached. No difficulty would arise in proving the genuineness of the bond; for the bonds have *written* on them the signatures of the State Treasurer and Second Auditor. Acts of Va., 1870–71, p. 379, § 4. The bond not being wholly in print, but signed *in writing by the agents of the State*, the act of January 21st, 1886, would not apply to it, and hence, as to it, expert testimony would be as admissable, as it ever was. The bond being established as genuine, the genuineness of the coupons attached thereto would also be determined. Thus the jury would have genuine coupons before it, with which to compare those in issue. With such testimony the merits of the controversy could be established. Hence, even if the act of January 21st, 1886, applies to an issue had under the statute of May 12th, 1887, yet it is simply a legitimate change in the rules of evidence. The State merely says: "You shall not hereafter introduce a witness to swear that the coupons tendered are genuine, but you may prove them to be genuine, by introducing one of my bonds with coupons attached." Such is only a legitimate change in the remedy.

For the above reasons, we insist that the act of January 21st, 1886, cannot have the effect of making the statute of May 12th, 1887, unconstitutional.

STATUTE OF MAY 12TH IS CONSTITUTIONAL.

Having shown above that the acts of January 21st and 26th, 1886, cannot be construed into making the statute of May 12, 1887, unconstitutional, it remains only to examine the statute itself, and see whether in any of its provisions it violates the constitution.

In the statute the State says, in brief, to tax-payers: "You may tender coupons, but my officers shall not receive them, because I propose to protect myself from having my taxes paid in fraudulent or illegal coupons. After you have tendered the coupons, and they have been refused, and my law officers become satisfied that you have not otherwise paid your taxes, then I shall have suits brought against you for your taxes. In those suits you are only called upon to prove that you tendered coupons, and that the coupons so tendered are genuine. When you do that I will receive the coupons, and the judgment shall be entered in your favor, and your taxes shall be marked satisfied."

That is all that the statute requires of a tax-payer who tenders coupons. Wherein can such a requirement be unconstitutional?

The State undoubtedly has the right to protect herself even from the possibility of forged or illegal coupons being tendered. If authority be needed for such a proposition, then we say that such a right was fully recognized in Sneed vs. Tennessee, (96 U. S., 69). It was again recognized in Antoni vs. Greenhow, (107 U. S., 769). The right is established.

Can any legitimate objection be raised to the manner in which the State proposes by said statute to protect herself? In Sneed vs. Tennessee, *supra*, it appears that originally the tax-payer had the right by the writ of *mandamus* to force the reception of his coupons. By the amended law the State required the tax-payer to deliver his coupons, if he wished them received, to the tax collector, who should send them on to the Court of proper jurisdiction for verification, and that the tax-payer should at the same time pay his taxes in money. Those steps having been taken the tax-payer had to file his petition in the proper court, asking an issue to be had before a jury, whether the coupons were genuine or not. This Court held unanimously, with the exception of Mr. Justice Field, that the State for its protection had the right to make such a change. Again, in Antoni vs. Greenhow, *supra*, this Court reaffirmed that decision as to a similar case coming up from Virginia. Such then must be regarded as a settled doctrine in this Court.

We submit that as a State has the right to make such a change in the remedy, as announced in the two cases just cited, and as a State has the right to protect herself from the use of counterfeit or illegal coupons, there can be no legal objections to the requirements of the statute of May 12, 1887. Under that statute no burden is put upon the tax-payer half as onerous as those inflicted under the statutes of Tennessee and Virginia, that were upheld in the two cases just cited. There the tax-payer had to have double the amount of his taxes, one in coupons and one in money. Here he has only to have his coupons. There he had to remain without the use of his money until his case was decided. Here he has not to give up any money, nor even surrender his coupons until the case is decided. There he had to be at the expense of instituting a suit, and under the Virginia law he could not recover his costs. Here he is not required to institute a suit, but only to come in and prove the tender and the genuineness of his coupons. The slight cost arising from such defence can not constitute a breach of the contract. Curtis vs. Whitney, 13 Wall., 70 and 71. Wherein lies the the violation of

the contract that makes the statute conflict with section 10, article 1, of the Constitution of the United States? Can the State's contract be misconstrued into meaning that she would enact no law to protect herself from spurious coupons? Surely, so absurd an agreement must be plainly expressed in the contract, and can not arise by implication. No such provision is intimated in the contract. Then the requirement by the State that the tax-payer shall first satisfy the State that the coupons tendered are genuine, is no breach of the contract. Especially when she enacts that, as soon as you satisfy her that they are genuine, she will receive them. Is it a breach of the contract for her to say, the best way in which to determine our rights is by a trial by jury, and to prescribe that as the way in which she will be satisfied of their genuineness.

"Neither does the positive requirement of an issue as to the genuineness and receivability of the coupons, and a trial by jury affect the validity of the law. Antoni vs. Greenhow, 107 U. S., on p. 778.

In Antoni vs. Greenhow, 107 U. S., on p. 781, this Court said, "The primary obligation of the State is for the payment of the coupons. All else is simply as a means to that end. * * * A remedy, therefore, which is ample for the enforcement of the payment of the money is ample for all the purposes of the contract."

That being true, is it not equally true, that a remedy, therefore, which is ample for the enforcement of the reception of the coupons is ample for all the purposes of the contract? That remedy is furnished by the statute of May 12th, 1887.

Can it be a breach of the contract to bring a suit to decide the genuineness of the coupons, after the tender had been made? It is claimed in the complainant's bill that this Court said in Poindexter vs. Greenhow, 114 U. S., 247, that a tender of coupons is a payment of the tax. It is true that this Court did use such an expression. But the language of a Court must be read in the light of the circumstances to which it is applied. Doubtless all that this Court meant by such an expression was that the tender was a payment to such an extent as to protect the tax-payer from a levy upon his property. It could not have meant that it was such an absolute payment as to prevent a suit for the debt. Payment does not possess such efficacy. How then could tender of payment possess such a quality? Such has never been recognized as the effect of a tender of money. Newsom vs. Thornton, 66 Ala., 311.

If a tax-payer should tender money to a tax-collector and he

should refuse to receive it, such a tender would not be an absolute payment, so as to prevent a suit by the State for the tax. The action of debt was proper at common law for a tax. Savings Bank vs. United States, 19 Wal., 227.

If such an action were brought, where money had been tendered and refused, the plea of payment would not stand. The plea would have to be that of tender. Under the statute of May 12th, 1887, that plea is allowed. There is nothing in coupons that makes a tender of them more of a payment than does a tender of money. The tax-payer "stands *upon the same footing*, in this respect, as though he had tendered gold coin in similar circumstances and with like result." Poindexter vs. Greenhow, 114 U. S., p. 281.

As the State has the right to bring a suit for the taxes after the tender of coupons, an act requiring such suits cannot be a breach of the contract, when it provides for the acceptance of the coupons, if they are proved genuine.

Nor is the requirement that the tax-payer shall prove the genuineness of the coupons any breach of the contract. Such a requirement is merely declaratory of the common law. Any one who tenders a paper must prove its genuineness, unless exempted by statute. Shepherd vs. Frys, 3 Grat., 442–4.

In view of the above, we submit that act of May 12, 1878, is not unconstitutional. Such being the fact, is it not then evident that the suit of the said complainants is a suit against the State.

II.

A SUIT AGAINST THE STATE.

The question as to what is a suit against a State, has been so frequently discussed in this Court, and so frequently decided by this Court, that no discussion, in opposition to the decisions of this Court, will be indulged in in this brief. So far as the positions assumed in this brief are concerned, it is not deemed necessary to ask for the slightest modification of any of the principles announced in those decisions. Here those principles will be recognized as *stare decisis*.

The question as to what is a suit against a State, first arose after the adoption of the eleventh amendment to the Constitution in the case of Osborne vs. The U. S. Bank, 9 Wheat., p. 738. As to that decision we submit—

First, That the case did not call for a decision of the question, because the Bank was not an individual, but a part of the government of the United States. It was held in McCulloch vs. The State of Maryland, 4 Wheat., p. 316, that the Bank was an instrument which was "necessary and proper for carrying into effect the powers vested in the government of the United States." That construction was reaffirmed in Osborne vs. The Bank. (See p. 860.) There is no provision of the United States Constitution preventing the National Government from suing a State. No decision therefore of the question was called for by the case.

Second, We insist that this Court has repeatedly overruled the announcement made in that case that "the eleventh amendment which restrains the jurisdiction granted by the Constitution over suits against the State, is of necessity, limited to those suits in which a State is a party *on the record.*"

It is true that that guide was recognized in Davis vs. Gray, 16 Wal., 203–220. But this latter case has been spoken of by this Court as going to the extreme limit of jurisdiction. Notwithstanding this recognition, we insist that the test, so announced, has frequently been disregarded by this Court as being the only one.

In Woodruff vs. Trapnall, 10 How., 190, it was held by a divided Court of five to four that a United States Court could issue a mandamus against the Attorney-General of Arkansas, requiring him to accept the State bank notes in satisfaction of a judgment in favor of the State.

But it afterwards appears in a similar case of Curran vs. Arkansas, 15 How., 304, that that State allowed herself to be sued.

In the subsequent case of State Bank of Ohio vs. Knoop, 16 How., 369, Mr. Justice McLean, who delivered the majority opinion in Woodruff vs. Trapnall, *supra*, said:

"The Constitution of the Union, when first adopted, made the State subject to the judicial power. Could a State, while this power continued, being sued for a debt contracted in its sovereign capacity have repudiated it in the same? IN THIS RESPECT *the Constitution was very properly changed*, as no State should be subject to the judicial power generally."

In Board of Liquidation vs. McComb, 92 U. S., p. 531, the question again arose. This Court held—

"The objections to proceedings against State officers by mandamus or injunction are: first, that it is, in effect, proceeding against

the State itself; and, secondly, that it interferes with the official discretion vested in its officers. *It is conceded that neither of these things can be done.* A State, without its consent, cannot be sued by an individual; and a Court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter."

It will be noticed, that while the above case does not mention what was intimated in the citation from the case of The State Bank of Ohio vs. Knoop, that a suit to enforce a State contract is a suit against the State, yet it does decide, what was not recognized in Osborne vs. The Bank, *supra*, viz., that a suit against a State officer, as to a matter about which he has to exercise official discretion, is a suit against a State.

This latter principle had its origin in the many cases against the officers of the United States. Kendall vs. United States, 12 Pet., 613; Decatur vs. Paulding, 14 Pet., 497; United States vs. Seaman, 17 How., 230; United States vs. Guthrie, 17 How., 304; Mississippi vs. Johnson, 4 Wal., 498; Gaines vs. Thompson, 7 Wal., 352; Litchfield vs. Register, 9 Wal., 375; Secretary vs. McGanahan, 9 Wal., 298.

It is true that many of the cases just cited arose as to the power to issue a *mandamus* to an officer. But that is an immaterial difference. For in Gaines vs. Thompson, *supra*, it was held that the principle, as to an officer exercising official discretion, announced as to applications for a mandamus, applied with equal force to a prayer for an injunction.

The next case in which the question arose was Louisiana vs. Jumel, 107 U. S., 711. That was held to be a suit against a State, because it was an attempt to control the discretion of executive officers, and administer State funds. In the same volume, p. 769, appears the case of Antoni vs. Greenhow. In that case the majority opinion did not touch upon the question whether it was a suit against the State. But in the concurring opinion of Mr. Justice Matthews, it was held to be a suit against the State, because "a suit to compel the officers of a State to do acts, which constitute a performance of its contract by the State, is a suit against the State itself." See p. 783. Here appears for the first time a distinct announcement of the existence of the principle that was intimated in *The State Bank of Ohio vs. Knoop.*

The question next arose in Poindexter vs. Greenhow, 114 U. S.,

247. There this Court, by a majority opinion, delivered by Mr. Justice Matthews, held that that suit was not one against a State, and enumerated the tests by which this Court decides whether a suit is against a State or not. The tests are as follows:

First, Whether a State is named as a party on the record.

Second, Whether the action is directly upon the contract.

Third, Whether the suit was brought to control the discretion of an executive officer of a State.

Fourth, Whether the suit was brought for the purpose of administering the funds actually in the public treasury.

Fifth, Whether it is an attempt to compel officers of the State to do acts which constitute a performance of its contract by the State.

Sixth, Where the case is such that the State is a necessary party, that the defendant may be protected from liability to it.

As the minority of this court held in the case just cited that that case was one against a State, it cannot be presumed that they were of opinion that the tests just enumerated should be more limited. It can therefore be regarded that any case that comes within the said tests is held by this court to be a suit against a State.

We insist, so far as this brief claims, that the suit of complainants comes within the third and fifth tests.

This Court has repeatedly decided what is a ministerial act, and what is one requiring the exercise of official discretion. In United States vs. Guthrie, (17 How., 304,) it was said:

"Thus it has been ruled that the only acts to which the power of the courts by *mandamus* extends, are such as are *purely ministerial*, and with regard to which *nothing like* judgment or discretion, in the performance of his duties, is left with the officers," &c.

In Gaines vs. Thompson, (7 Wal., 347–352,) it was said:

"A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which *nothing* is left to discretion. It is a *simple, definite* duty, arising under circumstances admitted or proved to exist and imposed by law."

See Mississippi vs. Johnson, 4 Wall., p. 498; Litchfield vs. Register, &c., 9 Wal., 575; Secretary vs. McGanahan, 9 Wal., 298; United States vs. Seaman, 17 How., 225–230; Decatur vs. Paulding, 14 Pet., 497.

Such being the rule, we submit that the institution of actions, under the statute of May 12, 1887, by the Attorney-General and the

different Commonwealth's Attorneys, is not "a simple, definite duty," in respect to which "nothing" is left to discretion. Has the institution of a suit ever been regarded a mere ministerial duty? Is there any act that requires more of judgment and discretion? The said statute calls for the exercise of discretion on the part of the said officers. It does not require the officers to bring suits merely because coupons have been tendered and refused. The officer must also be satisfied that the taxes have been "not otherwise paid." To pass upon that question the officer has to obtain information, to which he must give such weight as his judgment dictates. Is the drawing of a notice for which there is no prescribed form, a mere ministerial act? Suppose that the notice stated that coupons had been tendered and rejected, but did not allege that the taxes had been "not otherwise paid," would it not be defective, in that it did not show a proper ground for the proceeding? The drawing of the notice cannot be a "simple, definite" act; it is one that requires judgment. It appears that the State officers have to exercise judgment in determining whether a cause of action exists, and also as to how to take the first step. The duty required them is not then a ministerial one. The decisions of this Court last above cited, will show instances where less discretion had to be exercised, yet this Court held the acts required not to be ministerial duties. We submit that the suit in which this proceeding arose is a suit against a State, in that it is an attempt to control a State officer as to a matter about which he has to exercise discretion. Hence the lower Court was without jurisdiction.

Again: This is a suit against a State, because it is in substance a bill to prevent the State from objecting to receive coupons for taxes. It is a suit to prevent the State from making even any temporary objection to receiving them. It is in substance an attempt to force the performance of the contract. It is not an attempt to restrain an officer, who has absolutely refused to receive them, from committing trespass by levy upon one's property. It is an attempt to enforce the performance of the contract, by preventing the State from objecting to receive the coupons. It will not do for the complainants to say that the tax-payers are willing to stand on their tenders. They are not willing to stand on their tenders. Their tenders are not payments. A tender of a debt, and refusal, does not prevent an action for it. Yet the complainants pray that a tender be held an absolute payment, although the tax-payer is still

in possession of the things tendered; and they pray an injunction because the tax-payer tendered coupons, when they would not be entitled to such a process, if the tender had been in money. Surely, then, they do not pray that the tax-payers may have only the legitimate advantage of their tenders. They pray for something more, because they wish the tenders to be treated as something more than tenders are regarded in law. In reality their suit is an attempt to make the State receive without question the coupons, or in other words, to compel the performance of its contract. In substance the bill prays that the State may be required to accept *all coupons* tendered by *any person whatsoever*. They do not ask that the State be enjoined from proceeding against the purchasers from them; but that the State be enjoined from suing *any person whatsoever*, no matter from whom he may have obtained his coupons. Does that prayer show only a desire to have their purchasers stand upon their tenders? If such was the real object of the suit, they would have asked only for protection for said purchasers. When they go further and ask that *all* persons tendering coupons be protected, they show the suit was not brought merely to protect their purchasers by means of the tenders made, but that it was brought for a broader purpose. What can that purpose be, but to compel the State to perform her contract? There is another feature of the bill that demonstrates that it was not brought to protect them, through the tenders of their purchasers. It is where they express the fear that their speculation will be disastrous. The language of the bill is—

"That the *great bulk* of Virginia's tax-payers pay small sums, and if her officers are allowed to enforce said act of May 12th, 1887, *against them*, the profit to be derived from purchasing your orators' coupons will be too small *to induce them to do so*, and, indeed, it *will be* impossible for them to use said coupons at all, except in the very limited cases in which they can produce said bonds."

Does such language as that apply to past transactions, or to future intentions? If it does not apply to past transactions, how then, can it be said that the bill was intended to protect the complainants through the tenders made by their purchasers? If it applies to future intentions, how can the bill be regarded, as aught else than an attempt to compel the State to perform her contract? Such language plainly shows that the object of the complainants was to require the State *hereafter* to receive the coupons without requiring

proof of their genuineness under an issue provided for in the statute of May 12th, 1887; or, in other words, to perform her alleged contract. To render this "assurance doubly sure," we ask the Court to observe also the allegation in the bill on the 7th page of the record. There, also, they harp upon their desire to compel the State to perform her contract, so that they *will be* able to sell their coupons. We ask the Court's attention to how little prominence is given to the sufferings of their purchasers upon the alleged equities of whose tenders they come into Court. In the minds of the complainants the past sufferings are as nothing to those that lie in the future. In truth, the bill, whether viewed as a whole, or analyzed as to its parts, shows clearly that the object had in view was to compel the State to perform her contract. It is, then, a suit against the State, and one as to which the lower Court was without jurisdiction.

Again, we insist that the suit is one against the State, because the State, though not nominally, is substantially the party against whom relief is asked.

Mr. Justice Matthews in the majority opinion in Poindexter vs. Greenhow, *supra*, intimated on p. 296, when citing Fowler vs. Lindsay, 3 Dal. 411, as a test, whether a suit is against a State or not.

In the opinion delivered by him for the majority of this Court in Haygood vs. Southern, 117 U. S., 52, he announced such as a test. On p. 67 he said:

"But to these bills the State is not in name a party defendant. * * * Though not *nominally* a party to the record, it is *the real and only party in interest*, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. * * The State is not only *the real party* to the controversy, *but the real party against which relief is sought by the suit*, and the suit is, THEREFORE, substantially within the prohibition of the eleventh amendment," &c.

And, p. 71, the opinion reads:

"And the Court cannot proceed to the determination of a cause or controversy, to which the State is an indispensable party, without its presence."

Guided by the above test, we insist that this is a suit against the State. Who is the real party against whom relief is asked? Does the bill show any personal claim against Rufus A. Ayers, John Scott, J. B. McCabe? Does it allege that any one of them pro-

posed to commit a trespass? It does not. And therein lies one difference between the suit of the complainants and the case of Allen vs. Balt. & O. Rd. Co., 114 U. S., 311. The institution of a suit by any one of the defendants under the statute of May 12th, 1887, would give no cause of action. Bicknell vs. Dorion, 16 Pick., 478; Wigg vs. Simonton, 12 Rich. (S. C.), 583; Hunt vs. Printup, 28 Ga., 297. Can the Attorney-General, or any one of the Commonwealth's Attorneys, know before trial that the coupons tendered were genuine? Who is the real party to the proceedings enjoined? Is it the attorney or the plaintiff who is the State of Virginia? The attorney has "no personal interest in the subject-matter of the suit." The only party plaintiff interested in the suit enjoined is the State, and its rights are to be adjudicated by the lower Court without it having a hearing. The judgment to be rendered in the injunction suit, without giving the State a hearing, is to prevent the State from bringing suits that it claims to have the right to bring. For enjoining all its legal advisers and attorneys deprives it of an opportunity to bring the suits. The State, in that manner, is as much enjoined as if she were a nominal party. Hence its rights are adjudicated without it being accorded a hearing. And the rights thus adjudicated are, whether it has the right to institute certain suits. Thus, without allowing the State to make a defence, it is proposed to make her receive all coupons, whether genuine or fraudulent. The bill asks the Court to hold, without proof, without the State being heard, that all coupons heretofore or hereafter tendered are genuine. Against whom is sought such relief? If that can be called relief, which is oppression?. It is undoubtedly against the State, though obtained by suing her officers. We maintained that it is a suit to compel the State to perform her contract. Such being its object, it follows, that the relief really sought is against the State, and not the individuals alluded to as defendants in the bill. Although the bill does not pray, in terms, for relief against the successors of the officers (as was noticed in Hagood vs. Southern), yet the attorneys who drafted the bill so intended it, and the lower Court so construed it. This is seen from the proceeding had against the petitioner J. B. McCabe. Otherwise he was never a party to the bill. The injunction process was served on his predecessor, in office, and never on himself. Yet he was fined for disobeying the order of the Court. As a successor in office he was treated as a party.

We submit that from the evident object of the suit, from the alle-

gations of the bill, the relief desired is not against the individuals referred to in it, but against the State; and "*therefore*" it is a suit against the State, as to which the lower Court was without jurisdiction.

Again: We insist that the suit is against the State, even though the duties, required by the statute of May 12th, be ministerial. An act done by a State officer for the benefit of the State under a valid State law is an act of the State. This is clearly recognized in Poindexter vs. Greenhow, *supra*. See the language of Mr. Justice Matthews on pp. 287, 288, 293, which need not be here quoted.

We have shown above that the statute of May 12th, 1887, is not unconstitutional, but valid, and authoritative to the officers of the State. Hence, whether the duties required be ministerial or discretionary, the suit below was against the State and beyond the jurisdiction of the lower court.

III.

THE BILL IS WITHOUT EQUITY.

The bill in this case should have been dismissed for want of sufficient equities. It comes within the decisions of Parsons vs. Marye, 114 U. S., 327, and Hagood vs. Southern, 117 U. S., 52. By those two decisions the complainants are without legal complaint. The complainants here, like those in the two suits just named, are not tax-payers, and have never, as such, tendered any coupons, and therefore, *as to them*, the State has passed no law violating the obligation of her contract. In Parsons vs. Marye, on p. 329, this Court said:

"To enable the complainant to avail himself of the benefit of his contract with the State, to receive his coupons in payment of taxes, he must first assign them to some one who has taxes to pay, as he has not; but when he does so, by the assignment, *he has lost his interest in the contract, and his right to demand its performance, all right* to which he has transferred with the coupons. It is *only when in the hands of tax-payers or debtors*, that the coupons are receivable in payment of taxes and debts due to the State."

In Hagood vs. Southern, *supra*, p. 64, it is said:

"He has no legal right to have this scrip received for taxes, *unless he owes taxes* for which it is receivable," &c.

Such being the legal position of the complainants, the lower court had no authority to entertain a bill founded upon an alleged breach of contract, as to the receipt of coupons for taxes. "It is *only when* in the hands of tax-payers or debtors, that the coupons are receivable in payment of taxes and debts." The complainants, not being tax-payers, had no right, as long as they held them, to require that they be received for taxes. The complainants having no right to insist upon their being received for taxes, as long as they held them, how could they acquire that right by parting with the coupons. By selling the coupons they could acquire no additional right. Instead of acquiring by the sale an additional right, they lost their only interest in the contract, and their right to demand its performance, "*all* right to which" they transferred with the coupons. Such is the law as decided by this court in two opinions. The case now before this court does not differ from the two cases last above cited, except that in this case the complainants had sold some of their coupons. That difference is an immaterial one, for, by the sale of the coupons they transferred all interest in the contract, as to those sold. As to those not sold, not being tax-payers, they never had any right to demand that they should be received for taxes.

In either aspect of the complainant's bill—whether as to the coupons already sold, or as to the coupons that they desire to sell—no ground appears for the injunction.

The claim for the injunction is based upon the idea of preventing a multiplicity of suits, and of preventing clouds being put upon the titles to many parcels of land, and to prevent irreparable injury.

CLOUDS UPON TITLES.

As to the claim that clouds will be put upon the titles to many pieces of land, it is sufficient to say that no land of theirs is to be affected. They cannot come into equity, because the title to some one else's land is to be injured.

MULTIPLICITY OF SUITS.

As to the idea of multiplicity of suits, it is sufficient to say that as this Court has held that they had no *legal right* to insist upon a performance of the contract, they have no legal interest in said suits to entitle them to an injunction.

But even if the complainants had a legal interest, yet an injunction "will not lie against different persons for separate infringements or violations of one and the same right." High on Injunctions, Vol. 2, 1549. Dilly vs. Doing, 2 Ves. Jr., 486. Brinkerhoff vs. Brown, 6 John., Ch. 155.

Especially should that rule apply to the tender of coupons. Proof of genuineness of one coupon does not establish the genuineness of another. The judgment in one suit cannot be affected by the judgment in another. The nature of the controversy requires a multiplicity of suits, and yet an injunction was asked, because of said multiplicity. The injunction should not have been granted upon that ground. Even if the multiplicity of suits applied, yet the complainants were not parties to any one of the suits, and therefore could present to the court no case warranting the injunction.

"It may be laid down as a general proposition, that a court of equity will not enjoin proceedings in an action at law in behalf of one not a party to the suit, which it is sought to enjoin." High on Injunctions, Vol. 2, § 1550. State of New York vs. Connecticut, 4 Dal., p. 1. State vs. McGlynn, 20 Cal., 233 and 274.

Nor have the complainants any such interest as entitles them to an injunction. Even if they had guaranteed to their purchasers that the coupons would be received for taxes, yet such a guarantee would not give them such an interest. In Roberts vs. Bozon, 3 Law Jour. Chancery, p. 113, it was held that a court would not enjoin a sale of land on the petition of one who had guaranteed to pay off an incumbrance thereon. In Hagood vs. Southern, *supra*, it appears in the statement of the facts, on page 57, "that the complainants lately disposed of a quantity of said scrip, on a conditional sale, that it could be so used in payment of taxes." Yet the allegation did not prevent this Court from holding that the lower court had no jurisdiction. If the complainants ever gave such a guarantee, it was a voluntary one, and can give them no right to an injunction. Not being tax-payers, they could not, according to Parsons vs. Marye and Hagood vs. Southern, *supra*, demand, while they own them, that the State should receive the coupons for taxes. "It is *only when* in the hands of tax-payers or debtors that the coupons are receivable for taxes," &c. Could they, by disposing of the coupons, become entitled to a remedy which they did not possess when they own them? Can a guarantee unsolicited by the State, and voluntary on the part of the complainants, so enlarge their

legal rights? The guarantee could not affect the State. The guarantee would accompany the assignment. By the assignment "he has lost his interest in the contract, and *his right to demand its performance.*" They had no right to enforce the contract before the assignment, and by the assignment their interest in the contract was lost. It is true that the State laws in force at the time of making a contract are held to be a part of the obligation. But those laws cannot form a part said obligation *as to those persons* who cannot make use of them. How can statutes, which a person cannot use, be regarded as a part of a contract, *so far as he is concerned.*

"The laws with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their *direct* and necessary legal operation controlled or affected the obligations of such contract." Insurance Co. vs. Cushman, 108 U. S., 51, 64, and 65.

We submit that even if the complainants had given a guarantee to their purchasers, yet they could not, by voluntarily intervening themselves between the State and her creditors, put themselves into a position by which they could sue the State.

But the complainants do not allege that they ever gave any guarantee. They mention the possibility of having to meet "reclamations." But that loose statement cannot be treated as an allegation that they gave any guarantee to their purchasers. Indeed the only proof of any guarantee in the cause are two or three copies of one filed with the motion against the petitioners for contempt. That guarantee was not given by the complainants. By it not one of the complainants seems to be personally bound. It seems to be a guarantee given by the complainant Cooper, not as agent for himself and the other complainants, but as agent for a certain English corporation of bondholders. Hence the complainants stand in this cause simply as persons, who, as to the coupons already sold, have lost all their interest in the contract, and who, as to the coupons unsold, have no right, as they are not tax-payers, to ask for any relief by which the State will be forced to receive the coupons for taxes without proof of genuineness. Such being the position of the complainants, the Court had no jurisdiction to grant the injunction.

"Nor will equity interfere by injunction for the protection of one who seeks relief indirectly, through the equities of other parties, on which they themselves do not insist." High on Inj't'ns, §1547;

Kerr on Inj't'ns, p. 207; Roberts vs. Bozon, 3 Law Jour. Chancery, p. 113.

Not only the "other parties" are not insisting on their own equities, but not one of them has any equity on which he could obtain an injunction. Cutting vs. Gilbert, 5 Blatchf., 259. Each of them could make his defence at law under the statute of May 12, 1887, more easily, with less expense, and as efficaciously as in an injunction suit. In a suit in equity he would have to allege and prove that he made a tender of genuine coupons. That is all he is required to do under said statute. The legal remedy being ample, the court on its equity side would have no jurisdiction to grant an injunction at the prayer of any one of the tax-payers.

Nor could the Court, even at the prayer of several of the tax-payers, obtain jurisdiction upon the ground of preventing a multiplicity of suits.

In addition to the authorities cited above, as to that ground of equitable interference, we refer the Court to a case bearing a striking similarity in some particulars to that of the complainants. It is the case of Cutting vs. Gilbert, 5 Blatchf., 259. It was there held by Mr. Justice Nelson, that—

"A bill of peace founded on the idea that all persons charged with a tax under the 99th section of the Internal Revenue Act, * * * have such a unity of interest in contesting the tax, that they may join as plaintiffs in a bill to restrain the assessment and collection of such tax, and that a determinate number of such persons may appear in the names of themselves and for the rest, will not lie."

But the bill in that case did not present as bold an attempt to stretch the powers of a court of equity, as is presented by the bill in this case. Here the complainants, *resting upon the equities of others*, not only allege the interest of a large number of tax-payers as plaintiffs, but also attempt to bring in a large number of defendants, *each* of whom is alleged as being about to commit *a separate and distinct wrong* upon some *one* only of the plaintiffs. Can such interests be mutual interests? Could a judgment, in any one of the suits enjoined, bear in any way whatever upon the judgment in any one of the other suits? The tax-payers have no mutuality of interests; the defendants are not joint tortfeasors. Hence we submit, in the language of Mr. Justice Nelson, such "a bill of peace * * will not lie."

Again: The legality of the statute of May 12th, 1887, never having been tested at law, in any one of the suits, an injunction cannot lie upon the ground of multiplicity of suits.

"The Court of Chancery will not grant an injunction to protect a party against a multiplicity of suits, until his right to such protection has been established by a *successful* defence *at law*, in some of the suits." West vs. The Mayor, &c., 10 Paige, 539.

"An exception exists, where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the Court acts in such cases by granting an injunction *only after* the controverted right has been determined *in favor* of the defendant *in a previous action.*" Wallace vs. Society, &c., 67 N. Y., p. 28.

The complainants' bill is not within the principle just announced. The constitutionality of the statute of May 12, 1887, has never been tested in any one of the actions at law, much less determined in favor of the defendant in a previous action. On the other hand, the acts of January 21st and 26th, 1886, which the complainants allege make the said statute of May 12th unconstitutional, have been declared by the Supreme Court of Virginia to be constitutional. See Cornwall vs. The State, supra. Until that decision is overruled, it is the law of the State. An appeal was taken in that case to this Court, and it is now pending herein.

Suppose that this Court shall hold the said decision of the Supreme Court of Virginia to be correct, and that the acts of January 21st and 26th, 1886, are valid; then the only alleged ground of complaint against the statute of May 12th would be removed, and the act would be also valid. Under such circumstances, what objection could be made to the actions which the bills allege are threatened by the State of Virginia? The suits would be brought under a valid law. The State would have the right to bring them, and there would be no ground whatever for an injunction.

We submit that the rule above announced should have been observed, and that the lower Court had no power to grant the injunction, as the right of the State under said statute of May 12th had not been determined.

IRREPARABLE DAMAGE.

As to this ground for equitable interference by injunction, we reply by quoting the opening sentence of the opinion in Parsons vs. Marye, supra:

"This bill is without precedent, and should have been dismissed. It is a clear case, as stated, of *damnum absque injuria.*"

The only damage that the bill alleges is the injury, which, it is claimed, will be suffered by the complainants by the tax-payers being frightened off from purchasing from them the unsold coupons. The same ground was alleged in Parsons vs. Marye and Hagood vs. Southern, *supra.* In the former case, this Court said:

"There is nothing shown in the bill by which he is prevented from transferring them to others who would have the legal right to use them in that way, except that, being discredited for such uses by the previous refusals of the officers of the State to receive other, but similar, coupons, the complainant can find no one willing to purchase them from him at a reasonable price for such purposes. This damage is not actionable, because it is not *a direct and legal consequence* of a breach of the contract, and is not distinguishable from the damage any creditor might suffer from the known inability or unwillingness of his debtors to perform their obligations."

In the other case the same ruling was reaffirmed. That ruling, until reversed by this Court, must govern this case so far as the complainants' unsold coupons are concerned. The fact that the complainants had sold some of their coupons to tax-payers, and they had been tendered and refused, does not affect the question as to their right to an injunction to protect their unsold coupons. Each coupon is a separate contract. The rejection of one is no breach of the contract as to another. A breach of the contract as to any one of the coupons cannot have taken place until that particular coupon has been tendered for taxes and refused acceptance. Hence the coupons of the complainants still unsold stand just as they would, if the complainants had not sold any. As to those sold, the complainants had given up all interest in the contract. They are given no larger or different remedy through the sold coupons than they would have had if the sold coupons had been disposed of by some other person.

We submit that instead of the complainants showing in their bill irreparable damage, they show "a clear case, as stated, of *damnum absque injuria.* The lower Court had no power to grant the injunction, and having no such power, it could not punish the petitioners for any breach thereof.

McCABE'S CASE.

The petitioner McCabe stands upon a different footing, in one aspect, from the petitioners Ayers or Scott, unless this Court holds that the injunction bound the successors in office of the different Commonwealth's Attorneys. Otherwise Mr. McCabe was never a party to the suit. Not being such, he was not bound by the injunction.

"The obligation of an injunction will not usually be extended to persons who are not named in the writ, and they will not be liable for a breach of a mandate which is not directed to them." High on Injunctions, §§ 1440 and 1548. Sickels vs. Borden, 4 Blatchf, p. 18.

Hence we insist that unless this Court shall hold, that the injunction bound the successors in office of the different Commonwealth's Attorneys, the petitioner McCabe did not disobey the injunction. If he did not, the lower Court had no power to punish him for contempt.

We ask that the petitioners be dismissed upon writs of *habeas corpus*.

C. V. MEREDITH, of Counsel,
with W. W. GORDON,
ROSCOE CONKLING,
JNO. RANDOLPH TUCKER,

November 1st, 1887.

123-43

IN THE

Supreme Court of the United States.

BRIEF OF JOHN A. CAMPBELL IN THE CASES OF NEW YORK AND NEW HAMPSHIRE VS. LOUISIANA.

FILED WITH BRIEF OF COUNSEL FOR THE STATE OF VIRGINIA IN THE CASES OF EX PARTE RUFUS A. AYERS, ET ALS.

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I.

The judicial power of the United States does not extend to any suit at law, or in equity, commenced or prosecuted by any individual or corporation against one of the States of this Union. This immunity is declared in the Constitution as an incident of the sovereignty which had existed before the Constitution was made, and has been asserted and maintained by the States from the declaration of their independence and their existence as free and independent States. No Court of the United States has rendered a final judgment in any such suit since the Constitution has existed.

Federalist, No. 81.
Briggs vs. Lifeboats, 11 Allen, 157.
Troy Railroad vs. Commonwealth, 127 Mass., 43.
State vs. Leckie, 14 La. Ann., 656.
Hart vs. Burke, La. Ann., June term, 1881.
Swann vs. Buck, 40 Miss., 656.
1 Walker (Michigan) R., 9.
Railroad Co. vs. Alabama, 101 U. S., 832. *Ibid.*, 337.
Pengree vs. Coffin, 12 Gray, 288–331.

II.

The eleventh amendment to the Constitution of the United States was superinduced by opinions delivered by a majority of the Judges in this Court, upon an interlocutory motion, and an *ex parte* argument in a suit by an individual against a State, and which was followed by the issue of process to other States to appear before the Court in similar cases. Chisholm vs. Georgia, 2 Dall., 419; Vassall vs. Massachusetts (not reported). When the process in the last named cause was served, the Governor of the State of Massachusetts convened the Legislature and demanded their counsel. The Legislature condemned this exercise of jurisdiction as not legal, and proposed the eleventh amendment to the Constitution for adoption as a security for the present and the future.

Congress by a vote approaching unanimity sanctioned the proposition, and the legislatures of three-fourths of the States concurred. The cases pending in the Court disappeared from the dockets without further order by the Court.

This amendment is declarative, and exposes to view the natural and regular import of the Constitution as understood by the States and the people. It embodies an expression of the will of the supreme and sovereign power within the United States. It is an authentic, exact, and infallible testimony of the true meaning of the Constitution itself.

Hollingsworth vs. Virginia, 3 Dall., 398.
Madrago vs. Governor, 1 P., 110, 627.
Florida vs. Georgia, 16 H., 417, 518, 519, 520.
Kentucky vs. Dennison, 24 H., 65.

III.

The conventions or agreements of one of the States of the Union with individuals create no juridical relation between the parties; nor create a juridical obligation. The immunity of the State from suit or claim in the Courts of the United States, in her own Courts, or elsewhere, leaves her conventions or agreements without other than moral sanctions. They belong to the class of conventions or pacts "*quæ non habent causam civilem*," and are distinguished from contracts which create legal rights that may be enforced by suit in tribunals established by the State. In the Federalist it is said

"There was no color to pretend that the States had renounced this immunity from suit, nor be divested of the power to pay their debts, in their own way, free from any constraints but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign and have no pretensions to a compulsive force. They convey no right of action independent of the sovereign will.

Federalist No. 81, p. 382, Ed. 1818.

The author of this number (Hamilton), in his report upon the public credit discriminates this characteristic of public debts. "Public debt," he says, "can scarcely be defined either property in possession or in action. It is evidently not the former till it is reduced to possession by payment. To be the second would suppose a legal power to compel payment by suit. Does such power exist? The true definition of public debt is a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

Hamilton's Rep. Annals of Cong. 1795, pp. 13, 62.

Mr. Webster in a professional opinion given to Barings & Co. in 1839, relative to State obligations develops the same sentiment, and declares this immunity of the States from any compulsory force. He says, "The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments; the same basis for example as loans made by the United States under the authority of Congress; that is to say the good faith of the government making the loan and its ability to fulfill the engagement * * *". He says, "It has been said that the States cannot be sued on these bonds. But neither could the United States be sued, nor I suppose the crown of England in a like case. Nor would the power of suing give to creditors, probably, any substantial additional security. The solemn obligation of a government arising on its own acknowledgment would not be enhanced by a judgment rendered on such a bond."

VI Webster's Works, 537; I Calhoun's Works, 260–263.

Justice Blackburn incidentally says, "That foreign and colonial governments frequently create a public debt, the title to portions of

which is made to depend on the possession of bonds expressed to be transferable to the bearer or holder; there can hardly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government."

Crouch vs. Cred. Fon., L. R., 8 Q. B., 384.

The French jurists recognize the difference between such securities and the ordinary commercial and mercantile obligations and credits which circulate on the Bourse. They say, "In effect that which gives to an obligation its character as an act of commerce is not its transferable quality by endorsement, or manual delivery, or the usage in regard to it in the course of trade. It is the nature, the cause, the origin of the act itself. It is impossible to maintain that the State performs an act of commerce, so that she is a merchant. The State does not borrow in order to trade, or to buy and sell again. Her act is of political or administrative import. The fact that the securities are sold in the market, or are quoted in the reports of the exchange does not alter the nature of the obligation nor the quality nor character of the debtor. These are independent of the obligation."

42 Dalloz, Jurisp. Gen. Tresor public, No. 1105.

A similar opinion is expressed by this Court in a suit relative to a bill of exchange drawn by the United States upon a foreign government. Such a draft was not a subject for the law merchant. Every security put forth by a State is dependent upon the action of the legislature for payment. A law is necessary for the withdrawal of the public money from the public treasury. Every bill of exchange drawn by it must be drawn on a fund and no officer can bind the State unless by the sanction of a law. No suit can be brought to enforce the making of an appropriation, nor to compel the payment of the money.

Bank of U. S. vs. United States, 5 How., 382.

2 H., appendix, 745, 760; Reeside vs. Knox, 2 Whart., 233.

The clause in the Constitution of the United States which prohibits a State from passing a law to impair the obligation of contracts can have no application to the securities thus issued or circulated. These securities have no juridical quality. They cannot be enforced by judicial means. They create for the holder no legal right which may be asserted in a legal tribunal.

It may be admitted that the duty to make payment according to the tenor of the bond is a moral duty and binding upon the conscience of the State. What we affirm, is that the Constitution of the United States contains no provision to constrain the performance of the duty by any legal or political sanction.

This court may, when a case is presented, refuse to acknowledge the validity of a law of a State which impairs the obligation of a contract. But there is no power to enforce against a State obligations for the payment of money which the State has executed.

IV.

The United States has enjoyed this immunity from suits from the organization of the government as matter of right. In a number of cases Congress have preferred to submit to the Courts classes of claim upon the public domain, and upon the Treasury by conferring on the claimants a faculty to bring their suit. Without such a license no suit can be maintained for debt or property against the United States.

United States vs. Clark, 8 P., 439.
Briscoe vs. Bank, 11 P. 321.
United States vs. McLemore, 11 H. 272.
Syren, 7 Wall., 157; Davis, 10 Wall., 15.
Carr vs. United States, 98 U. S. 410.
United States vs. Thompson; *Ibid.*, 486.

The United States in a series of acts of Congress pledged designated portions of the puolic revenue for the payment of the interest and principal of her public debt. Hamilton in his report dwells with anxiety and earnestness upon the importance of maintaining these pledges inviolate, and refers to the fact that such pledges had not been so regarded by other nations, but he is very far from insinuating that the public creditor had any compulsory force at his command or could obtain one from the judicial power of the United States. He assumes as facts that against a monarch properly so-called, or against a sovereign number in its collegiate and sovereign capacity, constitutional law is enforced, or protected from infringement, by merely moral sanctions; and against a monarch properly so called, or against a sovereign number in its collegiate and sovereign capacity constitutional law and the law of nations are nearly in the same predicament. Each is

positive morality rather than positive law. The former is guarded by sentiments current in the given community, as the latter is guarded by sentiments current among nations generally. 1 Aust. Jurisp., 277. The facts were illustrated and established by the Congress to which Hamilton addressed his report. Mr. Hillhouse, of Connecticut, speaking of the financial settlement, "The fact is," he says, "that at the close of the late war and even at the time of establishing the present government a literal compliance with all of the then existing engagements was well known and generally understood to be impracticable. This government, therefore, offered such terms as they thought just and equitable, and within the compass of the ability to fulfill, and in the same act held up the idea that no better provision would be made for nonsubscribing creditors for they were to have four per cent. though their contract was for six. This however throws no imputation upon the government for they did all they were bound to do in honor or justice to do, all things being considered, and every creditor ought, and every reasonable creditor will be satisfied." Annals of Congress, 1795, pp. 12, 38. The obligation to pay the debts referred to was imposed by the first section of the sixth article of the Constitution of the United States. It was a part of the supreme law of the land. The creditors had no *vinculum juris*. Theirs were "*pacts quæ non habent causam civilem.*" Theirs were imperfect conventions as to which there was no legal remedy in case of a non-observance—no legal obligation.

The case is one strictly analogous to the case stated in the bill.

V.

The cause presented to the Court by the plaintiff is that the State of Louisiana proposed by act of her legislation in 1874, to fund her bonds and warrants outstanding by an issue of consolidated bonds, bearing annual interest at the uniform rate of seven per cent. This plan included the rejection of forty per cent. of the principal. The proposition embraced an offer of a specific tax to be levied, and to be applied to the discharge of the interest and principal. There was an issue of about 11,000,000 of these bonds. In 1879, a convention called for the purpose of revising the constitution of the State, superceded the constitution then existing and this law of taxation, and proposed to the bondholders the reduction of the interest

on these bonds, leaving the principal unimpaired. The creditors holding the consolidated bonds have not since the adoption of the constitution been paid interest. Those only who have accepted have been paid at the rate proposed in the constitution. This plaintiff complains that thirty coupons held by her have not been paid; that is, three instalments of interest on ten bonds are due. Besides the plaintiff makes an averment that citizens of New York hold consolidated bonds and the prayer of the bill is for a judgment or decree in favor of this plaintiff upon all such securities thus possessed. The defendants deny that they ever made, or delivered a bond to the plaintiff, or that any controversy ever existed between them. It appears that in May, 1880, the Legislature of New York passed an act which authorized her citizens to transfer any written evidence of debt he might have against any one of the States of the Union, to the State, and that her Attorney-General should bring a suit in the name of the State. This act has the same title, as an act passed by the State of New Hampshire for the same purpose in 1879, and otherwise resembles it. The act does not designate the Supreme Court of the United States as the forum, as the Act of New Hampshire did.

The fact that there is any other than a vicarious controversy between these States, is established. New York is a volunteer to maintain her citizen in his claim by lending to him her name for use in this Court. We have brought to the notice of the Court that no citizen of New York, or other State or country, has any title to appear in this Court to commence or prosecute a suit against the defendants or other persons for this or any other cause. Neither can a citizen of Louisiana commence or prosecute a suit against the plaintiff in this Court; nor in the Courts of New York. The plaintiff has sovereignly enjoyed her sovereign immunity from all suits. The annals of Congress show her successful obstruction of an act to enable her feeble neighbor (New Jersey) to settle in this Court a controversy as to jurisdiction and boundary, and her opposition to the jurisdiction when asserted in this Court.

New Jersey vs. New York, 5 Pet., 284.
Annals of 17th Cong., pp. 53, 390, 394.

Every holder taking the bonds of the State had full knowledge that no suit could be maintained in this Court or in any other, in case of a failure to make any payment. No suit has been com-

menced against the State, except, under the acts procured from New Hampshire and New York in this Court.

VI.

The contention of this plaintiff is that the exclusion of the United States and every one of their citizens from the exercise of a faculty to maintain a suit against the States of the Union, displays no hesitation nor reluctance on the part of the people of the United States to invade the immunity of the States from civil suits which they enjoyed from the day of their independence. Her act passed in May, 1880, invites any citizen of the State to assign to New York his demand against a State, and thereupon the Attorney-General shall bring the suit. The Act of New Hampshire limits the faculty of suit in the name of the State to the holders of bonds. The Act of New York allows the holder of any "written obligation to pay money." Another State may entitle any citizen having any claim or cause of civil suit against any of the States or any citizens of other States of the Union, or of foreign States to make the assignment. The contention of the plaintiff implies that whenever one State acquires by assignment, colorable or otherwise, any cause for civil suit from a citizen against a State or the citizens of that State the Constitution has afforded a tribunal to be used for the determination of that suit. We do not see that the claim of the State to sue here upon assignments is dependent on any fact affecting the residence or citizenship of the assignor. The barratry and maintenance involved in the instigation and prosecution of such suits would be conspicuous if the invitations of the act to make assignments were addressed to all men instead of being limited to citizens of the State. The legal operation of an assignment from a citizen does not vary from an assignment made by a stranger. Either would give the colorable title such as the plaintiff exhibits in this suit. We assume that New York has the same right to maintain a suit in this court upon an assignment of any holder of bonds, as to maintain a suit for the benefit of the citizen who made the assignment to cause the commencement and prosecution of this particular suit. The faculty conferred upon the State is to bring suits here in respect to controversies with other States of the Union, or with citizens of other States. It is a faculty denied to the United States and to all of their citizens. Controversies between two or more

States must be shown to the Court as the ground of jurisdiction over the cause. The grant is special, circumscribed and particular. The *controversy* must exist between the States and not others. Controversies between States have but little similitude to those between individuals. The Roman jurists distinguished between public conventions and private contracts, and they gave an admonition that they should not be confused, and that different considerations and principles applied to them. The controversies between States arise out of their public relations and intercourse, and where their corporate or political rights are involved. In the articles of confederation, and in the precedents shown by the records of this Court, the only causes of controversy known arise out of unascertained or disputed boundaries and jurisdiction.

VII.

It is an historical fact that every colony which united in the Declaration of Independence had its controversy concerning boundaries and jurisdiction. During the Confederation commercial regulations contrary to the Articles of Confederation occasioned others. These disturbed confederate harmony, and were heard of in the settlement of the terms of the Union. Such disputes in colonial times had been settled by the King in council effectively. None disputed his authority. Had he undertaken to bring suits in his own name to collect a debt for one of his subjects by preference, there would have been dispute.

Campbell vs. Hall, 20 St. Trials, 323.
Amos Eng. Const., 156–159.

His interference with domestic administration at home or in the colonies would have been resented. The regular and acknowledged jurisdiction of the Crown in the settlement of questions of jurisdiction and boundary naturally and necessarily devolved upon the Congress of the Confederation. The first impression was to substitute the Senate for the Congress and such was the draft of the Constitution of 1787. Rutledge, noting the fact that many disputes had been composed, moved that the delegation of the authority be transferred to this Court. What controversies were to be submitted to the Court, and in what form, and under what conditions has not been defined by Act of Congress. Congress has merely conferred the jurisdiction of the cases specified in the Constitution in the words it employed.

For a long period this was deemed insufficient. In 1814, Kentucky sought an authority from Congress to bring suit to settle a boundary with Tennessee. This had been a controversy between Virginia and North Carolina. The application of Kentucky was unsuccessful.

Annals of 13th Cong., p. 2004.

Mr. Crittenden made a second or third attempt upon a memorial of the legislature in the Senate in 1819. He encountered opposition and was defeated.

Annals of 15th Cong., pp. 252, 278, 304.

Senators Dickenson and Southard presented a memorial from New Jersey for an authority to litigate with New York. There was animated opposition from the New York Senators Rufus King and Martin Van Buren.

They represented the legislation to be mischievous and ought not to be resorted to except under a great necessity. The bills reported were general. The Senate seemed disposed to deal only with individual cases and to make special acts for the particular case.

Annals of 17th Cong., 1 sess., 53, 390, 394.

This history shows a settled opinion that cases of controversy between States were to be deprecated and not encouraged. That public policy was not promoted by such suits. That the Congress seemed to be unaware of any jurisdiction as having been granted in any previous act. This Court determined otherwise in New Jersey vs. New York, 5 P., 284.

VIII.

The States of New Hampshire and of New York at intervals of about a year, adopted acts that have the same title for the amplification of the stinted and scanty business of this Court. A bill with the same family likeness was introduced into the General Court of Massachusetts. That respectable State did not sanction it. The object of these acts is the same. It is to subordinate the authority of this Court to the aims and emolument of the jobbers in stocks and securities. New Hampshire sues for two hundred and ten dollars; New York sues for ten hundred and fifty dollars. Both States acknowledge they have no title save that they obtained by the

inducements of their respective acts. Both acknowledge they have no interest in the result of the suit, and that the assignments are colorable, and that the decrees of this Court, if favorable, would enure to those who could not maintain any original suit whatsoever, in this tribunal. The faculty of these States to convoke a sister State to this Court by summons or writ cannot be transferred nor delegated nor shared. The concurrence of all the departments of the government of the United States cannot add to the original jurisdiction of this Court, nor alter it. The jurisdiction is limited to designated parties by the Constitution.

No State by a legislative act or contract can pervert it to any purpose other than that the Constitution contemplates. All laws of a State, all contracts of a State for the purpose, are contrary to the order, rule, design and policy of the Constitution of the United States and are void. This Court has annulled bills of credit issued by a State; acts of secession adopted by States; contracts contrary to treaty stipulations; to obtain partialities and favors from Congress, departments of government, official persons. It has annulled State laws which sought to hinder persons from bringing suits into this Court, or to limit their constitutional right.

All of these instances contravened the constitutional or legal order of the Union. A Court of Chancery habitually contemns and reprobates all merchandising, huckstering, fomenting of litigations, though not within the prohibition of any enactment against champerty or maintenance. The statutes of these States do not apply to procedure or practice in Courts under their legislative control, but are directed against the procedure and jurisdiction of a Court into which they can never come, except as suitors in a controversy which legitimately exists between them and their sister State or its citizens.

Their laws assume that besides a settlement of their own controversies, they may champion all such as may be transferred by an inhabitant of the territory.

Craig vs. Missouri, 4 P., 416.
Marshall vs. B. & O. Co., 16 H., 314.
Kennett vs. Chambers, 14 H., 38.
4 Otto, 535; 12 Wall., 342.
1 Black, 419.

IX.

Leaving the question of the plaintiff's title to a debt, we come to examine further the question of the accountability of Louisiana for the Constitution of 1879 and the laws passed to her creditors by consolidated bonds. The claim is that the State is answerable upon the contract as made in 1874. We have no occasion to deal with the subject under any conditions that relate exclusively to the State, and the moral obligations which exist and bind the conscience of the State as a moral being. Obligations purely moral are to be enforced by the operation of internal and invisible agents, not by the agency of human laws, is a dictum of Chief Justice Marshall:—"All admit that the Constitution refers to and preserves the legal, not the moral, obligation of the contract" is his assertion in Ogden vs. Saunders, and in Sturges vs. Crowinshield: "The contract protected is one which respects *property* or some object of value, and confers rights which may *be asserted in a court of justice.*"

Dartworth vs. Woodward, 4 Wh., 627.

Legislation of the States "had weakened the confidence of man in man and embarrassed all transactions between individuals by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the State Legislatures were forbidden to pass any law impairing the obligations of contracts."

Ibid., 627–8.

The published debates of the convention show that the seminal principle of this clause is to be found in the ordinance adopted in July, 1787, by the Congress of the Confederation sitting in New York for the government of the Northwest Territory. One of its sections is: "In the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or to have force in any territory, that shall in any manner whatever interfere with or affect private contracts or engagements, *bona fide* and without fraud previously made.

Rufus King, a member of the convention, called attention to this section of the Act some weeks after, and moved that it form part of the Constitution and applied to the States. Instead of this there were adopted the prohibition of bills of attainder and retrospec-

tive laws. The committee on Style reported the words that are now found in the 10th section of the first article of the Constitution.

Neither in the convention that adopted this clause, nor in the conventions that ratified the Constitution was there a complaint made, a remonstrance urged, or any inquiry or explanation expressed which in any manner assumes that a State was prohibited from managing the affairs of its treasury and of its finance, under any constraint from this clause in the Constitution.

X.

When the Constitution was adopted the States were involved in debt. Their bills of credit were the only form of currency, and were depreciated. None anticipated that these bonds would be paid in full. There was distress among the inhabitants. We do not find in the debates in the convention that framed the Constitution, nor in those that approved and accepted it any reference to this clause of the Constitution as preventing a State from passing a law for a settlement of their debts on such terms as they might prescribe. In all of the allusions to this clause the reference was to the private contracts and engagements—the ordinary traffic between man and man which is spoken of so clearly in the ordinance of 1789. None apprehended interference or control over the States in dealing with this difficult and embarrassing subject. The concurrent opinion of that time was confirmed by the unanimous opinion of this Court three score years and upwards afterwards, when that Court announced that all those who deal in the bonds and obligations of a sovereign State must rely altogether on the sense of justice and good faith of the State. That the judiciary of the State cannot enforce the contracts without the consent of the State and the Courts of the United States are expressly prohibited from exercising jurisdiction.

Bank of Washington vs. Arkansas, 20 H., 530.

When the section of the ordinance of 1787 is examined, and which Mr. King moved the convention to incorporate it into the Constitution, it will be found to embody the same conclusion that was adopted by the committee on style to whom were referred the proceedings of the convention of the 28th August, 1787—of that committee, King, who made the motion, and Wilson, who sup-

ported it, were both members, Hamilton, Madison and Wilson being the other members. The ordinance assigns for the restraint imposed on the legislative power "the just preservation of rights and property." The restraint imposed is that no law should be made to have force, that interfered with or affected private contracts or engagements *bona fide* and without fraud, previously made. Chief Justice Marshall excludes from the operation of this clause any unprofitable and vexatious interference with the internal concerns of the State, or would unnecessarily embarrass its legislation, or which would render immutable civil institutions and confines its operation "to restrain the legislature in future from violating the right of property." It is stated in the argument of Sturges vs. Crowinshield, that Wilson is the putative author of the expression contained in the 10th section of the first article of the Constitution. This expression comes from the committee of style, and had not been used in the convention. The word obligation in connection with contracts has its origin in the civil law. The general term applicable to agreements relating to transactions and business and which created obligations, was pact or convention.

Conventions created obligations, extinguished obligations and translated property and real rights according to that law.

The conventions that created obligations which might be judicially enforced were denominated contracts. This word was not applied to the modes for extinguishing obligations, as payments, compensation, confusion, remission, though there was in these instances the assent of two or more persons to an act of a juridical character—thus a convention.

In the transfer of property the external act of formal delivery of the property was the dominant fact. The divestiture of the ownership of one, and the investiture of another with the right, was contemporaneous. The *vinculum juris* in such conventions arose and was extinguished by the fulfilment at once. In the common law, the feoffment illustrates this. After the statute of uses, the transmutation of possession was a consequence of the convention and was annexed to it. The written conventions are deeds—conveyances. The word contract was rarely applied to them, although all the qualities of a contract are to be found in any ordinary deed. The obligation of the contract is fulfilled by the deed. The deed remains a muniment demonstrative of title.

This classification of conventions appears in the modern works

upon the civil law, but contracts and contractual obligations are more nearly identified with conventions and conventional obligations under the modern codes.

2 Poth. de Pandectes de Justinian, p. 604, s. 1, 2.
Touillier, t. 6, nos. 8, 9. Duranton, t. 10, nos. 9, 11, 12, 13.
Dalloz, jurisp. Gen. verbo obligations, no. 44.
Larombiere des ob., p. 3, nos. 3, 4.

Chief Justice Marshall in his opinion in the case of the Dartmouth College examines with care the word contracts as employed in the Constitution. It is confined by him as in the Roman law to juridical subjects which may form a cause for judicial action. The description in that opinion would serve as an exposition of the word in a treatise on conventional obligations. In the case of Fletcher vs. Peck, the Chief Justice and Justice Johnson differ as to the application of the word to conventions which have been fulfilled on both sides and where property has been translated by deed or authentic act.

It is difficult to understand that there can be any obligation in respect to property or rights of property after the grantor has parted with title and possession by a valid conveyance to a competent grantee, in the absence of specific covenants. His subsequent conveyance of the same land to another is nugatory for he has no estate. His renunciation of his own deed or disputation of his own conveyance so long as the possession is not disturbed is merely jactitation of title; if followed by entry or an ouster the remedy is trespass or ejectment. The word contract implies that there is a convention about some property or civil right by which one becomes obliged to the other to do or forbear.

The failure to perform enables the obligee to exact performance in a court of justice. The Constitution of the United States restrains the States from depriving this obligee of any faculty the law affords to enforce this contract as made. If the contract be one which cannot by the condition of the parties, or of the character of the obligations be enforced in the Courts, no law passed in respect to it will violate the Constitution. The Constitution assumes the existence of a perfect and operative contract which under existing laws may be enforced as made in a Court of Justice.

XI.

It cannot be denied that when the bonds of Louisiana went from the board of liquidation into the hands of creditors of the State, that every one of them knew their dependence was upon the continuing sense of obligation on the part of the State to fulfil them.

That there existed no power of coercion in the Judiciary of the State. There was no contract made which had a judicial sanction or quality. The case of the plaintiff is that this is entirely true as respects every citizen of the State of Louisiana, every citizen of the United States, every human being on the face of the earth, but that the Constitution of the United States has established this Court with an authority to determine controversies between the States. This plaintiff has acquired some of the coupons of interest upon ten of these bonds, and asks for a decree against the State for the amount.

The Constitution of the United States was ordained to establish, organize, and consecrate a union of the States. The interests of this union are general interests affecting in some manner all of the States. We may agree that the general interest is superior in magnitude and public consideration to other interests. With hesitation we say that the particular and special interests not within the direct aim of the Constitution are secondary and subordinate.

We have no hesitation to admit that the public acts of administration under the Constitution and the Constitution itself are superior and supreme in their operation.

This Constitution is not and does not create a primitive organism. The Constitution is a result of concessions, compromises, sacrifices and consultations among organisms that were existing, and had sovereignty, independence, jurisdiction, right, declared in public records and existing by indisputable titles. All the authority conferred under the Constitution is delegated. What power and authority is not delegated is reserved to the authors of the Constitution for the self-government of the States and their peoples. Among the undelegated powers are those that affect life, liberty, property, domestic and social union, moral and material progress and development in the States, and their political social order and well being. I suspect the Union would not be lasting in case the States were inattentive to the interest which I have hesitated to say were sub-

ordinate or secondary. There was a great difficulty in making a partition of the powers and jurisdiction suitable for the administration and security of these general and particular interests. The first Chief Justice of the United States desired to have one great nation—the States retaining no more power than what might be necessary for domestic purposes and that their officers, civil and military, should be commissioned and to be removable by the national government.

Mr. Madison in the convention insisted that this government should have an indefinite negative upon all of the legislation of the States. Others advocated a subdivision of States, so that their territory be made nearly equal, and the extension of congressional control to subjects of police.

XII.

The Constitution did not establish a republic one and indivisible like that founded by France in 1793 and 1871. Nor did it establish an incorporate union like that of Great Britain—composed of England and Scotland—one kingdom, one parliament, and a destination of the crown by the same act of succession with a complete identity of citizenship and commercial privilege and internal taxation; nor is it a union like that of the monarchies composing the existing German empire. The States and the State governments are maintained. The State administration within all the range of the undelegated powers and the sovereignty and jurisdiction and immunities imported by them may be conducted and employed with the same freedom and fullness as if the federal Constitution had never been adopted. The States are not subjected to any negative upon their legislation, nor any control in the selection of their officers, nor is their power of coercion or suit conferred upon the United States against them. Among the reservations of power and right were those of dominion over their domestic affairs and the attribute of inviolability in the sovereign exercise of the dominion not ceded. When Mr. Justice Wilson asserted that there was no reason why a State should not be amenable to suit in a Court of Justice upon its contracts just as a merchant was, and for the same reason, and when he opened his opinion with a sneer at the claim of sovereignty at all, he only substituted his individual judgment, to the experience and habit of nations including that whose com-

mission he held and was employing at the time. The answer to the argument of his opinion was rendered by the States and the people. For whatever reason this immunity was established it exists to enable the States to execute the trusts reposed by their constituents, the people, and the immunity which was demandable, and was demanded, under the general conditions of the Constitution, has been acknowledged to have existed. President Wolsey, speaking of the clause which confers jurisdiction upon this Court to deal judicially with controversies between States designates it as arbitral in its nature. The controversies in the mind of the confederation and of the Union were strictly judicial; controversies which before the Declaration of Independence might have been decided by the king in council. They involved the interpretation of the grants to colonists and of the charters emanating from the crown, and the validity or signification of which Parliament or the king in council had authority to control or to pronounce upon. The confederation and the Union were alike indisposed to make the Congress or Courts appointed by Congress arbiters between citizens of other States and a State. The plan of the Constitution was so to organize the powers of government that one State should have no opportunity of controversy with another State. The vast expenditure of subtlety and craft to engender a controversy is shown by a perusal of the Acts of New Hampshire and New York.

XIII.

Humboldt, contemplating Nature rationally, decribes it to be "a unity in diversity of phenomena—a harmony blending created things dissimilar in structure and attributes into one whole." The American system of federal State and territorial governments, projected and organized by enlightened statesmen and patriots, was probably accomplished by following the cunning pattern of excelling Nature. The varied laws, interests, associations, habits and aspirations of the different States and peoples were not consolidated into a national unity, but all that could be preserved entire, and accommodated to the main design were retained. Only a few of the public men desired governments like those of Great Britain, France or Germany. The diversities in 1787 were so multifarious and clashing that the Constitution as framed to reconcile them was accepted as an experiment, and with

misgiving. The transfer to the keeping of the Union those interests that could not have been managed by one or more of the States separately, the careful remission to the States of all of the individual, domestic and local interests and the recognition and maintenance of the States in conditions of importance, dignity, and estimation, secured the existence of the one whole and animated it with the vital energy of the different parts. The Constitution does not protess to form an union perfect and absorbing. The Constitution ordains an union more perfect than the confederate union it superseded.

The union desired was one that had power to raise a revenue, to regulate commerce, control wars and negotiations with foreign nations, and to execute the laws among the people.

The destruction of the States and the removal of the patriotic sentiment and attachment their names inspire, was not a motive of any force among the people. The orator of the human race (Anacharsis Clootz) with his doctrine "that NATURE knows but one NATION and no Sovereign but the human race" had not yet appeared. There was no power delegated to the Union, nor a power withdrawn from the States, except with the purpose of making a harmonious blending of the parts into one composite whole.

There was no Pantheism in the politics of the country. The mischief would have been fatal if there had been. Such being the conditions is there any occasion for surprise at the uprising that was manifest over the mistaken and erroneous opinions delivered in Chisholm vs. Georgia by this Court.

One cannot read them over now, without wonder that they could have been conceived. No wound more deadly could have been inflicted upon the system of government adopted by the people of the respective States in convention than would have followed from an acquiescence in that judgment. No antagonism could have been more dangerous than that which would have arisen by harassing, vexatious, humiliating and exasperating contests which would have ensued among the States themselves and the citizens in litigations with States.

XIV.

The Constitution of the United States has made of the judiciary department, a separate department of this government. The absence of this department was a radical defect in the confederation. Judicial power was not conferred without reservation nor without definition. There was no purpose to make a central government without limitation of powers. History teaches that judiciary organization has been an effective, perhaps the most effective instrument for upholding absolute and despotic governments and the one through which acts of oppression and tyranny have been uniformly and successfully consummated. The undermining activity of the legal profession is a prominent fact in the history of Europe for many centuries.

Michelet informs us in respect to France. He says: "The Pandects were their Bible and Gospel; with texts, citations, falsifications, they demolished the Middle Age: Pontificate, Feudalism, Chivalry. There went through the kingdom judicial officers who circumvented, overreached, discouraged, destroyed the seignioral jurisdictions.

"In the centre of the web sat a council of lawyers called the Parlement of Paris."

3 Michelet, Histoire de France, 36–40.

Loiseau, himself a lawyer and co-worker, in a moment of compunction and compassion, writes: "As among all animals the great devour the small, so among men, and not only among them in general, but among men concerned in the administration of justice this same injustice has been exercised during all time; for the royal officers being superior and being fortified with the power of the king instituted continually, enterprises of every variety against the seignioral authority."

Loiseau, des seigneuries, ch. 12.

Our own Gouverneur Morris, a member of the federal convention, says it was observed in the convention at an early day when the necessity of drawing a line between national sovereignty and State independence was insisted on, "that if Aaron's rod could not swallow the rods of the magicians, their rods would swallow his."

3 Morris' Writings, 265.

The motive is the desire of supremacy and the principle employed by the legistes of every age is found in the Pandects: "*Quae ipse princeps constituit pro lege, pro lege servetur.* The king, the government is charged with the guard and the care of the nation. Sovereignty is theirs. Supremacy is theirs; what they establish for the common good is law. Seignioral justice is an emanation from them. Cases were drawn from all inferior courts because the king was concerned. Cases could not be tried in those courts because of interest in the question.

"Judgments were reviewed, on the charge there had been a failure or denial of justice. The legistes introduced the civil law, established unity and the power of the king, and left the people without liberty."

7 Laurent, Etudes sur l'histoire, 552–561.

England displays an analogous history. Her people resisted the civil law and the maxim of the Pandects. But the centralization of the Courts, the establishment of the Star Chamber, the Court of High Commission, the subjection of the Royal Judges took place. The decision in the case of Hampden was, "that the King might levy taxes without grant of Parliament in cases of necessity, or when the King was in danger, of which danger necessity, his Majesty was the sole and final judge," thus deciding that Magna Charta and the old constitution of England had ceased to be operative.

The great contest between England and Scotland, which was settled at Bannockburn, had its immediate origin in the claim of Edward I, to determine on appeals to him two civil suits between Scots in the Court of Scotland wherein judgments had been rendered. His jurisdiction was denied by John De Baliol the King. Edward asserted jurisdiction and proposed to punish the King for his contumacy. Then followed Wallace, and Bruce, and Bannockburn. The historian says the judicial proceedings were borne down by political impulses of a more powerful kind, and there were no more records of the appeals against the King and Parliament of Scotland to the King and Parliament of England. Their union was postponed for three centuries.

2 Burton, Hist. Scot., p. 161.

The majority of the delegates concerned in the making of the Constitution of the United States, refused to concur in any effort to suppress the States or the State governments.

They refused to confer upon the United States any power not required for the common defence or which tended to disparage or degrade the State governments. So strongly did they apprehend the mischief to follow from a government without limitation on its powers, that there was a danger that the Constitution, as framed, would not be adopted, and adoption was secured only by the promise of the addition of amendments to restrain and control it. The Constitution was the result of counsels of practical statesmen who were sincerely engaged to secure the blessing of liberty to themselves and their posterity. There was no speculative theory broached, nor ideal measure promising perfection proposed. Their aims were all direct and founded in experience.

There existed sectional jealousies and discordant institutions in the different States that might occasion hostility. There were interests that might be led to rivalry, or angry competitions. Combinations of States were possible and might lead to collisions and conflicts. There were adverse claims to the same territory. The question was how to remove these causes for internal commotions and to promote amity and peace. The States were secured in their independence, and were confined to the management of their domestic concerns. Treaties, confederations and alliances, which might promote association or connection, otherwise than through the Constitution, were inhibited. The Constitution was itself a treaty made a confederation and an alliance, and something more, a compact, an agreement and a union among all of the States.

Nothing more was needed, and nothing more allowed; no other compact nor agreement without the assent of Congress. The privileges and immunities of citizens were conferred upon all citizens in every State. An independent tribunal was created so that citizens of different States might settle their differences. No provision was made for the controversies of citizens with States, nor with the United States. There is no recognition of any capacity or faculty of a State to maintain the quarrels of her citizens with other States. Controversies between States of a judicial nature existed before the independent States became confederates, or had formed an Union. The confederation as well as the Union undertook to arrange such controversies. The caution with the arrangements are made to

show that such devices as New Hampshire and New York have adopted to introduce the complaints or controversies of citizens of one State against other States by lending their names and countenance to them, contradict the aims and the intent of the Constitution.

Gouverneur Morris, in a letter dated in 1814, says that the Constitution "was written by the fingers which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that part conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which, expressing my own notions, would not alarm others nor shock self-love, and to the best of my recollection that was the only part which passed without cavil. But after all what does it signify that men should have a written constitution containing unequivocal provisions and limitations. The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power which it wishes to exercise unless it be so organized as to contain within itself a perfect check. The idea of binding legislatures by oaths is puerile."

3 Morris' Life and Writings, 322–3.

The convention which made the Constitution, and those in the several States which adopted it, did not concur in this opinion. All the officers of the Federal or the State governments take oaths to support it. That none should have any mistake of the line between the powers of the Union by an arrangement made before the Constitution was adopted, the amendments offered in the various State conventions were to be returned to Congress, and the amendments proposed should be submitted to the States for adoption. The ninth and tenth amendments declare that the powers not granted to the United States are to be deemed to belong to the States or people. The oath to support the Constitution involves an obligation under oath, to maintain the reserved powers of the State inviolate.

There had been no example of a republic extending over a large extent of territory and subject to a central government that had maintained the liberties of the people. No general disposition was manifested to try an experiment of the kind.

A written constitution to be supported by all of those charged

with any faculty of administration under the obligation of an oath, was deemed to be a security of no small importance. Having sworn to exercise the powers delegated according to their intent and meaning, they did not suppose that the powers reserved would be exercised under any false pretence, that the intent or meaning was different.

The care with which the undelegated powers are protected from encroachment shows that none of those artifices or contrivances or inventions which have been employed to cover usurpation of ungranted powers, or the exercise of authority, jurisdiction or magistracy beyond the bounds established, had any sanction from the authors of the Constitution. There was a condemnation in advance of every attempt of the kind.

XV.

The bill of the plaintiff is brought to obtain a decree declaring the State of Louisiana to be a debtor for the sum of ten hundred and fifty dollars, the amount of thirty coupons that had come to the possession of the plaintiff of her issue.

That a decree should be made that all citizens of New York who hold consolidated bonds might have a decree in this cause in the name of the State for their amount and that principal and interest should be paid as it becomes due. That some articles in the constitution of the State of Louisiana and provisions of her law be declared to be void.

There have been suits in the Courts of Louisiana of a similar import brought against the Treasurer and the Auditor of the State by holders of securities of the same kind. Her Supreme Court has determined that there was no jurisdiction confided to her Courts to deal with such questions. No precedent for a suit of the kind exists. The municipal code of Louisiana is drawn from France. The highest judicial authority in France declared that the State as a public and political authority is justiciable only by herself. She alone can appreciate her own acts whether in her own favor or against her. A suit was commenced against the minister of finance to obtain payment of arrearages of a *rente viagere* inscribed upon the great book of the public debt. The Courts were without jurisdiction.

Dalloz, Jurisp. Gen. verbo Tresor pub., nos. 581, 574, and notes.

The management of the financial affairs of the State and the disbursements from its treasury as the depository of its revenues are not the subject of judicial cognizance. What the claims upon a State for its administration, for justice, public works, instruction, police, public debt; what are the resources to meet these claims and how these resources shall be applied can be determined only by the legislative authority. None can answer rationally the questions except by a general appreciation of all the possible exigencies in the affairs of the State and only after an approximate valuation of the property under its power.

What part of the government must determine where retrenchment shall be made? Who is to appreciate the relative importance of each object in the probable condition of the year or the years to come? It requires prevision, political forecast. The determination is confided in all constitutions to the supreme power of the State—the legislative department.

Burke has said that "the revenue is the State." Commenting on the revolutionary decrees in France of confiscation, so as to favor the general creditor of the State, he says: "These professors of the rights of man are so busy in teaching others that they have not leisure to learn anything themselves; otherwise they would have known that it is to the property of the citizen and not to the demands of the creditors of the State that the first and original faith of civil society is pledged. The claim of the citizen is prior in time, paramount in title, superior in equity. The fortunes of individuals whether possessed by acquisition or by descent, or in virtue of a participation in the goods of some community, were no part of the creditor's security, express or implied. They never so much as entered into his head when he made his bargain. He well knew that the public, whether represented by a monarch or by a senate, can pledge nothing but the public estate. And it can have no public estate except what it derives from a just and proportioned imposition upon the citizens at large. This was engaged and nothing else can be engaged to the public creditor."

Reflections on the Revolution in France.

1 Burke's Works, 503.

Niebuhr, commenting on the State interference between creditor and debtor in Rome, says, "If a person approves Sully for diminishing the interest, payable to the creditors who were swallowing

up the revenues of the State, and of his deducting the usurious profits they had long enjoyed from the principal; if he is aware how lowering the interest or the capital of its debt or the standard of its currency has been the only means whereby more than one State has been able to save itself from the condition in which the whole produce of the ground and labor would have fallen into the hands of the fundholders; if he knows how speedily and easily such wounds as this class sustain in their property heal; if he considers this when reviewing the history of the States of antiquity which were drained by private usury, he will be favorable to measures which tend to preserve hereditary property and personal freedom." The accomplished and able translators and annotators of the great work of Niebuhr, Bishop Thirlwall and Archdeacon Hare, say, "A State which sacrifices its taxpayers to the public creditors may be said *propter vitam vivendi perdere causas.*" Hume and Burke have declared that this idolatry of the national debt is worshipping Moloch.

1 Niebuhr, Hist. Rome, 464.
Bible. Nehemiah, Ch. V.

When we find the intimate connection that these financial questions have with the well being of the State, at all times, and sometimes with her very existence, the most authentic testimony that the States did not submit to any judicial arbitrament questions relating to the revenues of the State and the appropriation of the sums contained in her treasury to any judicial tribunal, nor bound her freedom to deal with all of such questions by any consent to the clause in the Constitution which allows this Court jurisdiction in controversies between two or more States is afforded. The Constitution provides that judicial power shall extend to all cases in which the United States are a party. The United States determine the cases in which they shall be a party. It is not long since, that claims on the Treasury were never submitted to any Court, and even now the commands of the Court do not extend to the Treasury.

Buchanan vs. Alexander, 4 H., 21.
Reeside vs. Walker, 11 H., 272.
United States vs. Guthrie, 17 H., 304.
Erie vs. Knapp, 29 Penn., 173; 64 Ill., 376.

The organization of the Treasury of the State of Louisiana is analogous to that of the United States, Great Britain and France.

The operations are limited, and the number of checks and balances fewer, but the system is similar.

The Treasurer is a separate officer, established by the Constitution. His office is to receive and to preserve carefully the public money, and not to disburse it but conformably to law.

No money can be drawn without a legislative appropriation.

Const. Lous., Art. 58, 14, 15.

These officers have no right or estate in the public money. They are mandataries, of a limited and defined commission.

There have been instances where such officers have been controlled by the Courts. The instances are rare, and imply a clear, distinct and unmistakable duty imposed by those who have authority to direct them. Those cases do not make any exception to the rule that the State is a sovereign, and that the State in its public and political capacity cannot be the subject of judicial process.

A State cannot be likened to an individual. Her mission is to control, direct and govern the complex, diverse, ramified and mutable interests of an entire community, occupying a separate territory, having a connexion with the past and obligations which reach to a remote future. The common sense of mankind has established that a State may not be arraigned and sentenced and coerced like an individual.

Hart vs. Burke, Treas.
State vs. Deslonde, 27 Ann., 71.
Elliott vs. Burke.
5 Dufour, Droit. Ad., 140–144.
March vs. State, 44 Tex., 64.
2 Wheat. In. L., 168.

The rule laid down by Blackburn, Justice, is that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting as servant. To take a familiar instance, if a mandamus is applied for against the Secretary of a railroad company to do something, it would not be granted merely because the railway company, his masters, had an obligation to perform the duty, and it makes no difference that the master, or the principal, or the sovereign who is only suable by petition of right, or is not suable at all. There is the familiar case of the surveyor of highways who is the servant of the

inhabitants of the parish; the inhabitants of the parish cannot be sued because they are not a body corporate, but the surveyor of the highways is not to be responsible for the non-performance of their duties, or the negligence of their servants, though he is the person who acts for them. * * *

His conclusion is: "That the obligation such as it is, is upon her majesty to be discharged through her servants, and you cannot proceed therefore against her servants."

The Queen vs. Lord Commissioners, L. R., 7 Q. B. 388–400.

The rule above set forth and which was sanctioned by others of the Judges sitting in that cause, has full support in the celebrated opinion of Lord Keeper Somers, in the case of the Bankers, which was cited by the counsel for the Lords Commissioners as they cited Brashear vs. Mason, 6 How., 92, and Decatur vs. Paulding, 14 Peters, 497. Lord Somers exposed the danger and difficulty of subjecting to the administration of a Court the financial arrangements of the Kingdom. Judges could not be conusant of the demands upon the Treasury, nor the necessities of the State; and if they were ever so urgent, judicial administration must be according to a fixed rule. Whenever the party comes to pay for it the judgment must go and the writ must issue.

Case of the Bankers, 14 Howell's St. Trials, p. 1, 103–104.

The principle and practice is discussed by Proudhon, much at large and we present an extract from his work.

He says: "When a personal action has for its object the compulsory payment of an obligation incumbent on the State, the essential conditions (*la raison* supreme) of the public service are opposed to the jurisdiction of the judicial tribunals. To appreciate the grounds upon which the adjustment of the debts of the State should belong to the administrative authority, it must be considered, that in general, that appropriations are set apart in the budget in advance of the receipts in the treasury for the various branches of the public service, such as the interest upon the public debt; the support of the civil and military service, payment of troops, maintenance of the army and navy, construction and operation of roads and internal navigation, and finally and generally for the expenditures necessary for the establishments of the State. If these funds were diverted or applied to objects for which they were not destined, the

movement of the public service might be paralyzed and confusion would result. For the independence of the judiciary power is such that when it has once pronounced upon a matter, within its jurisdiction, its decisions are *res judicata*, and have authority as law. If it were competent to convoke the government before the judicial tribunals and to condemn it to the payment of obligations charged upon the State it would be proper, to be concordant, to authorize the execution of the judgment against her, and then by the seizure of the sums existing in the treasury, the operations of the public service would be arrested by the withdrawal of the funds destined to keep them alive and active.

"Moreover, though nothing were permitted beyond the rendition of a judgment against the State by the tribunals, without a coercitive execution, this would expose the public fortune to the formidable chances which attend the litigation. Suits would be commenced against agents who not favoring the cost might prove dishonest and faithless, and thus give rise to a throng of unexpected demands which would bring disorder into the accounts.

"The public credit would be impaired by the admission of the principle that the State may be adjudged to owe a debt and for which the creditor has no power to obtain the payment. The nature of things resists the conclusion that the judicial tribunals shall have a jurisdiction, the result of which will be to declare the State to be a debtor, * * *. In a word, the administrative authority is alone competent to pronounce upon all the demands of which the decision would have the effect to create, even indirectly, or by reason of warranty, a debt against the State."

3 Proudhon, de la proprietie, Nos. 826, 7–8.

The cases cited from the Court of Chancery of Great Britain have a direct bearing on this question. The case of Vavasseur vs. Krupp, L. R. 9 Ch. D., 351, shows that the Mikado of Japan bought in Germany some ammunition of war, which was sent to England to be shipped to him at Japan. An English patentee complained of a violation of his patent and sought an injunction upon the English consignees to prevent their removal of the ammunition. The decision was: "This Court has no jurisdiction, and none of the Courts of this country have any jurisdiction to interfere with the property of a foreign sovereign, more especially with what we call the public property of the State of which he is sovereign, as distinguished from that which may be his own private property.

"The Courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented as all foreign countries are represented, by the individual who is the sovereign."

The case of Twycross vs. Dreyfus, 5 L. R. Ch. D., 605, is a case closely analogous.

There a special hypothecation for the payment of principal and interest of certain bonds was made of definite securities of the Peruvian Republic. Among the securities were the surplus proceeds of the guano to be imported and sold in London. There was guano in England which had been sold, sent for the purpose of paying the interest, and there was default and failure to pay alleged. The demurrer confessed the bill.

The Court determined that this was an attempt to attach the property of a foreign State in the hands of their agents, and the Court having no power to deal with the government as a party, they could not deal with their agents or property in the hands of their agents. The ground of their opinion is identical with that embodied in the opinion of this Court, as declared by the Chief Justice in the cases quoted in the statement of the first point in this brief.

Beers vs. Arkansas.

Bank vs. Arkansas, 20 How., 527, 531–2.

XVI.

Besides the claim that a decree shall be rendered in this Court for the plaintiff, as the owner and holder of thirty coupons of the specific amount of ten hundred and fifty dollars, there are allegations in the bill that there are a large number of bonds and coupons held by citizens of New York, and the bill imprecates the Court to decree an indebtment of the State of Louisiana for the amount of the bonds and the coupons to the plaintiff; and that the sums due for principal and the interest should be paid as they shall become due; and that the Court shall declare the constitution and laws of Louisiana arraigned in the bill to be void. The bill goes far beyond the concessions contained in the Act of New York of the 15th of May, 1880, set out in the bill. This act invites a citizen to place himself and property under covert of the State and by an *indirection*, the

prohibitions of the constitution against the commencement of suits against a State by an individual, will be evaded. This *indirection* is employed in all that portion of the bill which relates to the thirty coupons. The plaintiff, without any assignment, and without the privity of any bondholder, asserts she may as a volunteer inform she court that certain provisions of constitution and law of Louisiana affect prejudicially some indefinite number of her citizens and she prays for a judgment against them for a principal of a debt due thirty years and upwards hence, and the interest to accrue from time to time till the bonds mature. The judgment is to be held in trust for the citizens.

The judicial power of the United States is a limited power. It extends to cases of law and equity arising under the constitution, treaties and laws of the United States, and to cases of admiralty, and to cases between parties nominated in the III Article in the Constitution. It may be asserted that all of the cases determined in all the courts of the United States in any year, do not amount in number to one-two-hundredth part of the cases disposed of in the various courts and tribunals of the States.

The flatterers of kings have called them the fountains of justice. They have been likened to the sun, to the seas. That justice issues from them and returns to them. They illuminate as the sun does, the moon and stars, preserving its own brightness unimpaired. *In eo tanquam principe summo omnes thesauri dignitatem reconditi sunt; et ab eo velut a fonte omnes jurisdictionis procedunt; sicut omnia flumina permeatus terræ fluunt a mari, et ad mari refluunt.* The courts of the United States, unquestionably, are necessary in the organization of the United States, and fulfill a most important and essential function in their administration. But their concern with the subjects of life, property, reputation, domestic relations, succession and instruction is restricted. The courts of the States have jurisdiction in the great proportion of such controversies.

The bill claims a jurisdiction beyond what has ever been asserted before in the courts of the United States. Not simply in relations of persons and things, but that affect the constitution, character and capacity of the State.

By the revolution each State became a perfect and independent nation. Under the confederation and under the constitution, the national powers were abridged by the delegation contained in the articles of confederation and union. The colonies would have con-

sented to remain united with Great Britain upon conditions not dissimilar to those contained in those instruments. In both of the instruments they reserved all of the powers not delegated. These reserved powers are not enumerated for the reason that the powers surrendered were enumerated and those not enumerated were reserved.

No power was delegated to any individual citizen of the United States, nor to the United States in a corporate capacity to maintain such a suit before any tribunal whatsoever. The only function the Courts of the United States can perform with a State as a defendant, must be invoked by a State. The bill of the plaintiff assumes that any State may adopt as its own, what the State may denominate a wrong or a grievance of any of its citizens, whether he be a complainant or not, and bring the State inflicting the injury, or the supposed injury, before this tribunal by bill in chancery.

The fact that the Constitution contains a precise declaration that the judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by a citizen, seems to furnish to this plaintiff a motive for prosecuting this suit. One of her claims comes to her by an assignment procured for the purpose of bringing this suit for the citizen who has no title to set in motion the judicial power of the United States.

The other claim is that she may search the highways and byways for persons whose claims she may abet and maintain in this Court in defiance of the interdict of the Constitution. If there be any ground for these assumptions, it must come from the obligations supposed to exist between a State and the citizens of the State. The State has an interest in the wealth of her citizens. The State is bound to foster that wealth, and to protect them from oppression and injury from one of the States. The State may sue another State for a wrong done. The State may facilitate his collection of demands against another State. The State may sue the debtor State in assumpsit, or debt, or by bill in this court.

The first commentary we have to make is that the Constitution was made for the United States, and the judicial power, like all of the other powers delegated, were designed to serve the interest and welfare of the Union. Whatever interests were particular or individual did not enter into the grants of political or judicial power. Nor are the powers of the Courts to be expanded, nor their pro-

cedure to be abused for the accommodation of particular or individual interests. The Constitution employs the term States in the judiciary clause to denote the governments established by the people within their limits. These governments may have controversies arising out of jurisdiction and boundary, or other cause, and these controversies may be terminated by suit in the Supreme Court. In immediate relation to this clause is that which indicates that citizens may have causes of suit, and that the judicial power shall not extend to any suit they may commence.

The States themselves were placed under conditions which made controversies difficult. So difficult that it requires a vast amount of tentative experimentation to show a semblance of a controversy. Treaties, alliances, confederations, compacts, agreements, commercial regulations, wars and maintenance of armies and ships of war, afford occasions and opportunities for controversies between States. Discriminations and a denial of the ordinary privileges in the Courts and in the transactions of men to the stranger, give rise to disputes and differences. Acts of attainder and *ex post facto* laws affecting the stranger, awaken animosities. The Constitution inhibit these. Is it possible to imagine that the States could have contemplated that any State might come to the supreme tribunal of this country with a bill such as the one we are considering?

The article of the Constitution extending the judicial power to cases of controversy between two or more States and to cases where the parties claim under conflicting grants issued by two or more States would seem to be explicable by historical facts to which reference has been made and are attested by records of this Court. There were existing and irritating controversies that protruded in all discussions relative to Constitution or to a more perfect Union. The words controversies between two or more States, surely did not raise an apprehension that one or more States would resort to indirect and equivocal measures to encourage litigations in this Court and to engender the resentments that litigations habitually arouse. History abounded with beacons to warn States and peoples against the danger attending them.

For centuries there were constantly arising controversies between the spiritual power of the Roman Pontiff and the temporal power of kings and states. The Cardinal Bellarmin states the claim of the spiritual power and defends the claim: "*Ratione spiritualis potestatis habet saltem* INDIRECTE POTESTATEM *quandam eamque* SUMMAM *in*

temporalibus." "*Asserimus Pontificam habere in ordine ad bonum spirituale summam potestatem de temporalibus rebus omnium Christianorum.*" Bellarmin, de Romano Pontifice, t. v, 1, 2, 3, 7. De Maistre, du Pape, 239. The Cardinal disclaims as an enormity an imputation that the Pope claimed temporal power in states or kingdoms. Such a claim would be offensive to Christian conscience and derogatory to the dignity of kings and states. His power is only spiritual, relates to the salvation of souls. His dominion is not over the things of this world. All that is needful for the salvation of souls he may do. This compels an *indirect action* over temporal concerns. When this occasion arises, this action is sovereign, absolute over all temporal affairs. The temporal power may manage them without interference till the necessity arises, then it must give way.

The investiture of bishops and other clerical persons, the exclusive authority to pass judgment on the clergy, immunity of church property from taxation, the control over matrimonial causes and intestate successions, are some examples of *indirect action* of the spiritual power over temporal things. Another contested jurisdiction arose upon the last injunction to St. Peter, to feed the sheep and the lambs of the Christian flock. These were exposed to wolves. The fold was exposed, the flock would be devoured. They must be protected from wolves.

Heresy, schism, apostacy, blasphemy, and infidel publications are wolfish. The inquisition, the rack, the *auto da fe*, are methods of indirect action. New York and New Hampshire seem to have attained to a full appreciation of the latent forces to be found in indirect action and to a purpose to employ it. They seem determined to collect into their fold their unsuspecting and fearful lambs from their innocent and delightsome pasturage within the stock exchanges which abound in those States —

> "Pleas'd to the last they crop their flowery food,
> And lick the hand just rais'd to shed their blood."

The Acts of July, 1879, and May, 1880, of these States are the outcome of the benign temper of the legislatures of those States. The bill of New York proposes a radical change in the functions of the Court and the removal of all the landmarks that have designated its limits. It proposes an interdict to affect the executive department of the State, all of whose members have been brought before the Court. This bill is to remain in Court till July, A. D.

1914. Twice in each year New York proposes to come for semi-annual interest.

Thus the States propose an administrative and judicial administration, an indeterminate and undefined cognizance of questions and cases affecting States capable of extension to subjects of doubtful attribution, and to be developed in every direction during a third of a century. We have cited above an instance where baleful consequences followed from pertinacious and skilful employment of indirection.

The encroachments of ecclesiastical and royal jurisdictions upon other jurisdictions, the controversies in Great Britain between chancery, admiralty and common law jurisdiction; the scrambles among the King's Bench, Common pleas, and Exchequor Courts; the oppression and tyrannies of the Star Chamber and High Commission Courts are too familiar to the student of the judicial history of Great Britain for citation. All of these Courts, in Great Britain, have disappeared or are passing away before our eyes. The Parlements of France have all been dissolved, and their name has ceased to be used to designate legal tribunals.

The framers of the Constitution were familiar with this history. The Constitution establishes a single Court. The jurisdiction of that Court is defined. The appellate and the original jurisdiction is discriminated. The original jurisdiction embraces the cases of controversy between States of the Union. The cases hitherto decided have been cases which before the Revolution, the King in council might have decided. Under the confederation Congress would have appointed a tribunal for their decision. A single case was decided between Pennsylvania and Connecticut by the confederation, and we are told "that the circumstances of that dispute admonish us not to be sanguine in expecting an easy accommodation of such differences." "Connecticut gave strong indications of dissatisfaction with that determination. Nor did she appear to be entirely resigned to it till by negotiation and management something like an equivalent was found for the loss she supposed herself to have sustained."

Federalist, No. VII.

The scope of the jurisdiction conferred in such cases was circumscribed to such controversies as are of a judicial nature, otherwise, the judicial power would not have been employed in their adjust-

ment. The controversies were such as might arise in the intercourse of State with State, and such as to effect the right of one State, or the other.

The Constitution has established, without indirection, for individuals all the rights, privileges and immunities deemed necessary or appropriate, and has afforded all the guarantees for these that the public welfare required. The Constitution has not considered the citizens of the States as unable to manage their own affairs, and that the government of the Union, or of the State, must be involved in controversy on this account. Equality of right, privilege, immunity, and to the same protection of the laws, have been secured by the Constitution, independently of any State agency or assistance.

New York cannot ask for more on behalf of her citizens, nor can New Hampshire.

JOHN A. CAMPBELL,
Solicitor for the Defendants.

J. C. EGAN,
Att'y-General of Louisiana.

125-443

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Supreme Court of the United States.

IN RE AYERS & ALS.

NOTES OF ARGUMENT OF J. R. TUCKER.

I.

This is a suit against Virginia.

Canon for construction of 11th Amendment.
See Brief, p. 15.

(*a.*) It paralyzes her autonomy in the collection of her revenue.

Collector *vs.* Day, 11 Wall., 125–6.
City Veazie Bank *vs.* Fenno, 8 Wall.
Queen *vs.* Com'rs, 7 L. R. Q. B., 388–400.

Judge Campell's brief, p. 25 :

You forbade her collection by levy ; and this order now enjoins her suing.

Murray *vs.* Hoboken, 18 How.
Accord McMullen *vs.* Anderson, 95 U. S., 37.

(*b.*) It *prohibits* an essential part of judicial machinery of State court from acting—the attorneys.

Code of Va. (1860), ch. 170, § 5.

A writ of *prohibition*, not *injunction*.

(*c.*) The final order of commitment is a duress on attorneys, which operates as mandate to dismiss suits of the State and enter her judgments satisfied.

This is *mandamus*, not *injunction*.

(*d*). These orders enjoin official duty of discretionary and constitutional officers of the State.

Collector *vs.* Day said they shall not be taxed, this says they shall be imprisoned for doing their official duty.

(*e*). The order forbids Virginia to sue in her own court, because it enjoins the only and essential agency for suit from doing so.

A right to sue is inalienable. *Nulli vendemus, nulli negabimus aut differemus, rectum vel justitian.* Mag. Charta, C. 29.

Ex parte Garland, 4 Wallace, 379, per Field, J.; 384, per Miller, J.; Adams' Equity, 313-4.

Ex parte Virginia, 100 U. S.

But, it is said, this Court has decided all these questions.

Answer. They were *res inter alios acta.* Virginia has never been heard. This injunction denies her a hearing.

In Lee *vs.* United States (106 U. S.) the rights of the United States were reserved. Why not those of Virginia?

Again, the suits enjoined are against delinquents who have paid the State neither money nor coupons.

Again, she sues to test *bona fides* of tender and genuineness of coupons.

This injunction makes a tender not accepted discharge and satisfaction, and imprisons officers until so entered in a State court.

The Federal judge assumes charge of her treasury, seizes her political power into judicial hands. *L'État c'est moi!*

These officers are held until the suits of Virginia are dismissed and her judgments entered satisfied.

Does this not sue the State?

But another reason for this being a suit against State:

No equity against these officers, for they have no right or interest in the suits of Virginia. They are *hers*, not *theirs*. Through them this injunction attacks her in the citadel of her immunity.

See 1 Dan. Ch. Pr., 125, 299.
Fenwick *vs.* Reed, 1 Meriv., 123.

The cases settle these propositions:

1st. Where the agent of State has no right by possession of a thing, or right or interest in action which is separable from the State's possession, right, or interest in action, this Court holds the State is protected under the Eleventh Amendment from suit against her officers, as really against her.

2d. No injunction has been allowed or suit in respect to these coupons or the like, unless on seizure actual or menaced by, *ex parte* levy, and without judicial procedure.

See *ex parte* Royall, 112 U. S., 519.

3d. No injunction or action is allowed merely for bringing suit, and no injunction where remedy is plain and adequate at law.

4th. No injunction or action is allowed where the State's officers are charged with discretion, and not merely ministerial. Where the will and mind of the officer are the will and mind of State the immunity under Eleventh Amendment prevails.

Cases cited in brief:

16 How., 369–416; 18 How., 380, 331; 1 Blatch., 436. These were cases of suits against taxpayer, or by him to recover back.

Davis *vs.* Gray, 16 Wall., 202. Receiver under Federal court's order, to enforce his power under its order, enjoins officers from aliening the trust property. Court's decision partly on ground that Texas allowed herself to be sued in her own courts and could not object to it in Federal courts. Case however is doubted in after cases.

As to equity in this case—

Cross *vs.* De Valle, 1 Wall., 5.

Thompson *vs.* R. R. Co., 6 Wall., 134, and other cases cited in Brief.

Here the suit enjoined is Virginia's. The officer does not sue—the State does.

There levy was made by a man, who held the property, &c.

Here officers were charged with discretion.
There merely ministerial.

Here Virginia's right alone is attacked.
There the possession and right of the man.

Here you take away all autonomy.
There you do not.

Cases cited in Brief, Joumel *vs.* Louisiana, &c.

But it is said the laws with which this law is associated are unconstitutional.

Answer 1st. They have not been so held.

2nd. Premature to say State Court will not so decide.

3rd. If they do not appeal will lie to this Court.

4th. But if this act is constitutional, it is not affected by the others.

Presser *vs.* Illinois, 116 U. S., 252, and cases cited.

II. As to Sec. 720, prohibiting injunction to stay proceedings in State courts.

See 6 Blatch, 399; 2 Curtis, 469; 4 Dillon, 19; 5 McLean, 337; 1 Abbott, 388; 2 Blatch, 14.

But I take further ground. No Federal court, independent of Sec. 720 (Art. 1793), can enjoin except as ancillary to its previously-assumed jurisdiction, and to enforce it.

How can this be done when it can furnish no substituted remedy to the party enjoined in the State court? It stays Virginia from action, but gives her no remedy in lieu. It, in fact, has no jurisdiction of her or of the subject-matter of her suit. The injunction is, therefore, foreign to the suits stayed and not ancillary to the Federal jurisdiction.

J. R. Tucker
for Petitioners

123-443

Return

Supreme Court of the United States.

Ex Parte R. A. AYERS.
Ex Parte JOHN SCOTT.
Ex Parte J. B. McCABE.

Brief of Wm. L. Royall for the United States, filed by leave of the Solicitor General.

49227

Supreme Court of the United States.

EX PARTE R. A. AYERS.
EX PARTE JOHN SCOTT.
EX PARTE J. B. McCABE.

BRIEF OF WM. L. ROYALL FOR THE UNITED STATES, FILED BY LEAVE OF THE SOLICITOR GENERAL.

The order which the petitioners violated was issued upon the original bill filed June 7, 1887. That bill charged that the defendants were officers of the State of Virginia, but it did not charge that they were citizens of Virginia. The first amended bill, filed July 28, 1887, long prior to the time when the petitioners were committed, and prior to the time that all except petitioner Ayers violated the order, charged that the defendants were officers of the State of Virginia and also citizens of Virginia; so that the fact subsisted all the time that they were citizens of Virginia. The question, therefore, suggests itself, whether any person is justified in violating an injunction order merely because the necessary averments to give jurisdiction are not made in the bill. To justify any one in violating an injunction, must not the case show on its face that no amendment could be made which could give the court jurisdiction; as, for instance, if the bill should state that the complainant was a citizen of Great Britain and the defendant a State? If these be only defective averments, ought not the defendant to go to the court and call its attention to them, that the court might call upon the complainants to amend or submit to the bill being dismissed?

In the case of *Godfrey* v. *Terry*, 97 U. S., 171, Mr. Justice Miller says, at page 175, "if the bank had been a party its citizenship might possibly have been inferred," which is the same thing as to say if all the averments taken together show that a person is necessarily a citizen of a particular State it is not necessary to charge in terms

that he is such citizen. See also *Marshall* v. *B. & O. R. R.*, 16 How., 314. To say that a person is an officer of the State of Virginia is necessarily to say that he is a citizen of Virginia, for none but citizens of Virginia can be officers.

The Constitution of Virginia provides, Article III., section 2: "All elections shall be by ballot, and all persons entitled to vote shall be eligible to any office within the gift of the people, except as restricted in this Constitution."

Section 1 of Article III. provides that—

"Every male citizen of the United States, twenty-one years old, who shall have been a resident of this State twelve months, and of the county, city, or town, in which he shall offer to vote three months next preceding any election, shall be entitled to vote upon all questions submitted to the people at such election."

So that, to be an officer of Virginia, a person must be a voter in Virginia, and to be a voter he must be a citizen of the United States and a resident of the State.

The fourteenth amendment to the Constitution of the United States provides that—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

To be an officer of Virginia, then, a person must be a citizen of the United States and a resident of Virginia, and the fourteenth amendment makes all such citizens of Virginia.

SECTION 720, REVISED STATUTES UNITED STATES.

We insist that section 720 does not apply to a case in which the United States Court enjoins parties from COMMENCING suits in a State court. The suit must have been actually commenced in the State court in order to bring section 720 into operation—*Fisk* v. *U. P. R. R.*, 10 Blatch., 520; *Lottery Co.* v. *Fitzhugh*, 3 Woods, 255; *Live Stock Co.* v. *New Orleans*, 1st Abbott, 388; *Moore* v. *Holliday*, 4 Dillon, 54; *Cropper* v. *Cohen*, 2d Curtis, 468.

But we take higher and broader ground than this. We insist that when a State court is enforcing a statute repugnant to the Constitution of the United States it is without any jurisdiction whatever, and therefore it cannot be said that there are any "proceedings" in the State court. Such is the settled doctrine of this court.

In *Ex parte Royall*, 117 U. S., the court says, at page 248: "But

with respect to the other propositions, it is clear that, if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire PROCEEDING against him is a nullity."

As was said in *Ex parte Siebold*, 100 U. S., 371, 376: "An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."

So in *Ex parte Yarborough*, 110 U. S., 651, 654, it was said "that if the statute prescribing the offence for which Yarborough and his associates were convicted was void, the court which tried them was without jurisdiction, and they were entitled to be discharged."

In *Norton* v. *Shelby County*, 118 U. S., 425, the court said, at page 442: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The case of *Cadle* v. *Tracy*, 11 Blatch., 102, is an express authority for enjoining the execution of the judgment of a State court where that court was without jurisdiction to render the judgment.

In *Dietzsch* v. *Huidekoper*, 103 U. S., the court says, at page 497: "The suit upon the bond was, therefore, but an attempt to enforce a pretended judgment of the State court, rendered in a case over which it had no jurisdiction."

If, then, the act of Assembly which the State courts were about to execute was repugnant to the Constitution of the United States, there can be no doubt that they were without jurisdiction, and there could be no "proceedings" in them.

Ex parte Fisk, 113 U. S., 713, may be authority for the release of the petitioners if the court should find that the Circuit Court had no jurisdiction of the equity suit of *Cooper et als.* v. *Marye et als.;* but however that may be, it is certainly authority for the proposition that everything done in a court which has no jurisdiction of the cause is wholly *coram non judice*, and that such actings and doings are not *proceedings* in contemplation of law. So also is *Ex parte Bain*, 121 U. S., 1.

That the act which the State courts were about to enforce is repugnant to the Constitution of the United States is so palpable it will scarcely bear discussion. I call especial attention to the fact that the Circuit Judge has stated in his opinion, which is made part of the record, in two places, that no attempt was made in the argument before

him to show that the act was constitutional. Its unconstitutionality was conceded. The State's representatives stood up, confessing that the act was one of spoliation and robbery, but defying the court to arrest its enforcement.

Speaking of the contract which Virginia made when she issued these coupons, this court said in *Antoni* v. *Greenhow*, 107 U. S., at page 775: "The right of the coupon holder is to have his coupon received for taxes WHEN OFFERED." It said the same thing in *Poindexter* v. *Greenhow*, 114 U. S., at page 299.

The act of January 26, 1882, entitled "An act to provide for the more efficient collection of the revenue," &c., printed further on, forbids the collectors to receive coupons, and that statute stands unrepealed at this moment on the statute book. The act of May 12, 1887, is to be read, therefore, as though it contained a command to the collectors that they should receive no coupons for taxes. It is, then, an act providing that coupons shall not be received for taxes WHEN OFFERED, but at the end of a lawsuit—at the end of ten days or ten years, as the case may be. But this was not the State's contract. Her contract was that they would be received WHEN OFFERED—not at the end of a lawsuit. Plainly, therefore, the act violates this provision of the contract.

But further. The act is a scheme of spoliation and robbery, pure and simple. It is a plan for condemning all coupons, genuine as well as spurious (and no one but the Legislature of Virginia has ever asserted that there was a single spurious coupon in existence), as counterfeit, and then confiscating them to the use of the State. This is a strong proposition, but it is easily established.

An act now on the statute books of Virginia reads thus:

CHAP. 45.—An ACT to amend and re-enact section 39 of chapter 167, Code 1873, in relation to rules, pleadings, and evidence.

Approved January 21, 1886.

1. Be it enacted by the General Assembly of Virginia, That section thirty-nine of chapter one hundred and sixty-seven of the Code of eighteen hundred and seventy-three, in relation to rules, pleadings, and evidence, be amended and re-enacted so as to read as follows:

§ 39. Where a bill, declaration, petition, or other pleading, alleges that any person made, endorsed, assigned, or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by affidavit, with the answer, plea, or other pleadings which puts it in issue: provided, that no such affidavit shall be required where the signature of the maker, endorser, assignor, or ac-

cepter of any paper is not in the personal handwriting of the party to be charged, or his agent, but was made by machinery, or in other manner than by the actual or personal handwriting of the party to be charged, or his agent; then in all such cases the burden of proving such paper to be genuine shall be upon the party relying upon the paper so offered to be read in evidence: and it is further provided, that expert evidence shall not be received to prove the genuineness of any paper or instrument made by machinery, or in any other manner than by the actual or personal handwriting of the party to be charged, or his agent.

2. All acts and parts of acts inconsistent with this act are hereby repealed.

3. This act shall be in force from its passage.

Another act on the same statute books reads thus:

CHAP. 49.—An ACT to prescribe a rule of evidence in certain cases.

Approved January 26, 1886.

1. Be it enacted by the General Assembly of Virginia, That in the trial of any issue involving the genuineness of a coupon, appearing or purporting to have been cut from any bond authorized by law to be issued by the State of Virginia, or by any city, county, or corporation, the defendant may demand the production of the bond; and thereupon it shall be the duty of the plaintiff to produce such bond, with proof that the coupon was actually cut therefrom.

2. This act shall be in force from its passage.

This act has been declared constitutional by the Virginia Court of Appeals.

Both these acts have been adjudged by the Supreme Court of Appeals of the State of Virginia to be constitutional acts and no violation of the State's contract, in *Cornwall* v. *Virginia*, *Burroughs* v. *Virginia*, and *Newton* v. *Virginia*, reported in the *Virginia Law Journal* for , and now pending on writs of error in this court.

Now all the coupons issued by the State are engraved simply, as all commercial paper of this sort nowadays is, and are not signed manually, and the acts authorizing their issue provide that they may be thus issued. The coupon is one instrument, the bond from which it comes is another. The coupon may be here in the hands of a Virginia tax-payer, while the bond from which it comes may be in Russia, in the hands of an unknown citizen of that government. The bill expressly avers that neither the complainants nor the tax-payers can produce the bonds from which the coupons in controversy came,

and the two acts quoted make it impossible to prove them genuine unless the bonds are produced. It is therefore a legal certainty that in the trial that will ensue under the act of May 12, 1887, the holder will be unable to prove the coupons genuine, and therefore he must fail to remove the brand of spurious with which they went into the clerk's hands.

Let us see, then, what will take place on the trial of this issue. The defendant has no standing in court until he deposits his coupons in the hands of the clerk. This is the express command of section 5. The clerk is the hand of the State, and she thus gets the coupons into her possession before the fighting commences. The coupons go into the clerk's hand branded as spurious. The same section provides that at the trial the burden of proving the coupons genuine shall be upon the defendant, which, of course, is the same thing as branding them counterfeit at the start. When the defendant comes forward to prove his coupons he is met by the statute which provides that he can do it in no other way than by producing the bond, and as he is unable to do this, the jury must, of course, find against him, and thus his genuine coupons remain in the clerk's hands, under that brand of "spurious" with which they were stamped when they went there.

The 6th section provides that the clerk shall return to the defendant all coupons "not spurious." But the 5th section provides that he shall "carefully preserve" all that come into his hands that no other provision of the act directs him to part with, and, as the defendant will have failed to remove the brand of spurious, the clerk is of course to "carefully preserve" them for the future commands of the State. It is no exaggeration, therefore, to pronounce the act a scheme and plan for condemning all the State's coupons as spurious, and then confiscating them to the use of the State.

Further; the tender of the State's coupon pays the tax. The taxpayer owes her nothing after that tender. But this act provides for loading him, after he owes her nothing, with penalties and costs, and fixing a perpetual lien upon his property.

Speaking of Virginia's legislation respecting these coupons, this court said in *Poindexter* v. *Greenhow*, 114 U. S., at page 306:

"The object of these acts is to enable the State to rid itself of a considerable portion of its debt and to place the remainder on terms to suit its own convenience, without regard to the obligation it owes to its creditors. The whole legislation, in all its parts, as to the creditors affected by it and not consenting to it, must be pronounced null and void."

And on page 304 it said:

"The acts of Assembly in question must be taken together, as one is but an amendment of the other. The scheme of the whole is indivisible and cannot be separated into parts. It must stand or fall together."

On page 305 it said:

"Indeed, it is manifest, from the face of the laws themselves, that they are but parts of a larger whole."

This was the court's opinion of the State's legislation on this subject up to the time when it was speaking. Since then the two acts relating to evidence and the "coupon crusher" have been passed, and, as the learned Circuit Judge remarks in his opinion, these have not improved the constitutionality of the scheme and plan.

The act of May 12, 1887, must be taken to be part of that same scheme which met with such emphatic condemnation from the court. Indeed, that the whole of this legislation may come at one glance under the eye of the court, I print it all here successively, as it has been passed.

When the party which aimed at destroying the State's coupons came into control of the State, in 1881–'82, its first acts were the passage of a new funding bill, generally known as the "Riddleberger Bill," to be found at page 88 of the Acts of 1881–'82, and commented on by this court, 114 U. S. R., 305.

To compel funding under it it enacted two acts, named by the public press respectively, "Coupon Killer No. 1" and Coupon Killer No. 2. The first of these is set out at large in *Antoni* v. *Greenhow*, 107 U. S. R., at page 771. The second is as follows:

CHAP. 41.—AN ACT to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt.

Approved January 26, 1882.

1. Be it enacted by the General Assembly of Virginia, That the several tax-collectors of this Commonwealth shall receive in discharge of the taxes, license-taxes, and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else: provided that in all cases in which an officer charged by law with the collection of revenue due the State shall take any steps for the collection of the same, claimed to be due from any citizen or tax-payer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and under such payment the officer collecting the same shall pay such revenue into the State treasury,

giving notice at the time of such payment to the Treasurer that the same was paid under protest. The person so paying such revenue may at any time within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue, in the court having jurisdiction of the parties and amounts. If it be determined that the same was wrongfully collected, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and thereupon the Auditor of Public Accounts shall issue his proper warrant for the same, which shall be paid in preference to other claims on the treasury, except such as have priority by constitutional requirement. There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the tax-payer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in anywise issue, either injunction, supersedeas, mandamus, prohibition, or any other writ of process whatever; but in all cases for any reason any person shall claim that the revenue so collected from him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner. In all such cases, if the court certify of record that the officer defendant acted in good faith and diligently defended the action, the necessary costs incurred by him shall be taxed to and paid by the State, as in criminal cases. The Commonwealth's attorney for the county or corporation in which suit is brought shall appear and represent the defence. In every case where judgment is rendered for the defendant, a fee of five dollars shall be taxed in favor of said attorney, and against the plaintiff; and whenever the court shall refuse to certify the good faith and diligence of the officer defending the case, a like fee of five dollars shall be taxed against the said officer. Any officer charged with the collection of revenue, who shall receive payment thereof in anything other than that hereinbefore provided, shall be deemed guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, in the discretion of the court; but nothing herein contained shall be construed to subject any officer of the State to any suit, other than as hereinbefore provided, for any refusal on his part to accept in payment of revenue due the State any kind or description or funds, security, or paper not authorized by this act.

2. This act shall be in force from and after the first day of December, eighteen hundred and eighty-two.

The first of these acts was brought to judicial test before this court soon after its passage and sustained, so far as affirmative proceedings were concerned, in *Antoni* v. *Greenhow*, *supra*.

But, on the 15th May, 1883, Hon. H. L. Bond, United States

Circuit Judge for the District of Virginia, decided, in *Allen* v. *B. & O. R. R. Co.*, that the tender of the coupon paid the tax; that it was a trespass to levy for the tax after such tender; and that the officer would be enjoined from making the levy. This case came to this court by appeal, and is reported 114 U. S. R., 311. The preliminary injunction will be found at page 1 of the record in this court, and shows that it was awarded May 15, 1883, and the opinion of the Judge declaring what is said above to be the law, and also printed in the record, shows that it was delivered on that same May 15th. This of course demonstrated to the party in power that further "coupon killing" legislation was necessary. Accordingly the Legislature promptly passed joint resolutions declaring that it was vain for the creditors to hope to coerce out of the State better terms than those offered by the "Riddleberger" funding act. These resolutions are as follows:

Joint resolutions of both houses of the Legislature, approved by the Governor, December 21, 1883, as follows:

"The questions of the ascertainment and settlement of the debt of the State having for thirteen years profoundly agitated the people of Virginia, persistent, repeated, and earnest but unavailing, efforts having been made by a large body of the citizens and tax-payers of the State to effect and carry out a settlement of this debt, under which a much larger sum would have been recognized and assumed by the State than has been assumed by the act approved February 14, 1882, popularly called the 'Riddleberger Bill,' resulting in political contests which have convulsed the popular mind, given repeated and ruinous shocks to the business interests of the State, retarded the prosperity and threatened the safety of the people, and all of the issues involved in the final adjustment of this debt having, at length, in the years 1881 and 1882 and 1883, after years of discussion and controversy, been submitted to the arbitrament of the people and the courts, and the people having, after thorough canvass of the questions of fact and right involved, given their sanction at the polls to the measures, modes, and principles of settlement substantially involved in the 'Riddleberger Bill,' and the highest courts of Virginia and of the United States having sanctioned the validity and constitutionality of the law designed to give effect to the adjustment thus enacted; and it being of imperative importance to the people of Virginia, and essential to the security of the public creditors, that this settlement shall be taken as a finality, and that further agitation and controversy shall cease: therefore,

"1. Be it resolved by the General Assembly of Virginia, That the people of Virginia have accepted the act of February 14, 1882, known as the 'Riddleberger Bill,' as the ultimate settlement of the debt of

this State; that it is their unalterable purpose that that settlement shall be final, and that any expectations that any settlement of the debt of this State upon any other basis will ever be made or tolerated by the people of Virginia is absolutely illusory and hopeless.

"2. That the interests of the public creditors as well as the safety and welfare of the State require that this settlement shall be accepted by the creditors as well as by the State, and therefore the General Assembly of Virginia, on behalf of all the people of the State, hereby advise and call upon the holders of the bonds and claims against the Commonwealth to come forward with promptness and fund the same under the provisions of the act of February 14, 1882."

Again, on March 19, 1884, it by a preamble, resolved, as earnestly as before, that it would destroy the coupons if the creditor did not fund. And, by way of giving emphasis to that resolution, it provided in it that whenever a coupon found its way into the treasury it should be charged up against the principal of the bond, and when enough had been so charged that the bond should be deemed to be paid. That act is as follows:

CHAP. 540.—An ACT to provide a Sinking Fund for Tax-Receivable Coupon Bonds.

Approved March 19, 1884.

Whereas it is the intention of the General Assembly, so far as they have the power, to cause the basis of settlement provided in the act entitled an act to ascertain and declare Virginia's equitable share of the debt created before, and actually existing at the time of, the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon, approved February fourteenth, eighteen hundred and eighty-two, to apply alike to all the holders of the bonds of the State; and whereas many of the holders of the bonds have not accepted the provisions of said act, by reason whereof it has been impossible to prevent coupons being paid into the treasury for taxes, the holders of the tax-receivable coupon bonds in that way enforcing the payment of a higher rate of interest than is provided by the above-recited act: therefore,

1. Be it enacted by the General Assembly of Virginia, That the Second Auditor shall open an account in his office, to be known as the tax-receivable coupon bond sinking fund account, in which he shall be required to enter the number, amount, and date of each coupon that may be paid into the treasury for taxes; and he shall ascertain what amount of each of such coupons that may thus be paid into the treasury would have been payable under the act recited in the preamble to this act, if the bond from which the coupon was clipped had been funded under said act, which amount, so ascertained, he shall

deduct from the amount of the coupon, and the balance remaining shall be charged to the bond from which the coupon was clipped, as a payment upon the principal of such bond, and shall be deducted from the same at maturity.

2. This act shall be in force from its passage.

It added further emphasis to these resolutions by forbidding any one to sell the State's coupons to her tax-payers unless he paid her a special license-tax of $1,000 per annum and twenty per cent. of the face value of the coupons sold. This act is as follows:

CHAP. 450, Sec. 65, of the Acts of 1883–4.—Tax-receivable Coupon Brokers.

"65. No person shall sell tax-receivable coupons from bonds of the State of Virginia without a special license, for which privilege he shall pay one thousand dollars for each office or place of business kept for that purpose. In addition thereto, he shall pay to the State a tax of twenty per centum upon the face value of all tax-receivable coupons sold by him. At the time of making such sales he shall give to the purchaser a printed certificate, signed by him, stating the fact that he has sold such coupons to the purchaser, naming him. The said certificate shall also contain the number and amounts of the said coupons and the date of sale. Whenever such coupons are tendered for taxes, the broker's certificate shall be delivered to the collector. The said collector shall preserve the same until the first day of the following month, when he shall collect the said tax of twenty per centum from the said broker. But any stock broker may purchase such coupons for the purpose of funding them in new three per centum bonds of Virginia."

The Court of Appeals of Virginia has decided this act to be constitutional.

It also provided that any attorney at law who should bring a suit under "Coupon Killer No. 1," to recover back money where coupons had been tendered, should pay, in addition to his general license-tax, a special license-tax of $250 per annum. This act is as follows:

"Every attorney at law who has been licensed for less than five years shall pay fifteen dollars; and all attorneys who have practiced for five years and more twenty-five dollars: provided that no attorney at law shall be required to pay more than fifteen dollars whose receipts are less than five hundred dollars per annum: *provided further, no attorney licensed under this act shall be allowed to bring suit against the Commonwealth, or any treasurer or collector of taxes, for the recovery of money for coupons tendered for taxes, unless he take out a special license therefor; for which privilege he shall pay a spe-*

cific license-tax, in addition to the tax required under this section, of two hundred and fifty dollars."

It provided, further, that whenever a judgment was rendered against the State under "Coupon Killer No. 1," the attorney for the Commonwealth should take an appeal, whether there were grounds for it or not. Of course the plain purpose of this act was to have thousands of cases pending on the docket of the appellate courts, which would postpone suitors so long they would give up the contest.

This act is as follows:

CHAP. 397.—An ACT to give an appeal as of right to the Commonwealth in all cases where suits are instituted under the act approved January 14, 1882 entitled an act to prevent frauds against the Commonwealth and the holders of her securities in the collection and disbursement of revenues.

Approved March 12, 1884.

1. Be it enacted by the General Assembly of Virginia, That in all proceedings in any court of the Commonwealth, under the act approved January fourteenth, eighteen hundred and eighty-two, entitled an act to prevent frauds on the Commonwealth, and the holders of her securities in the collection and disbursement of revenues, and under the act approved January twenty-sixth, eighteen hundred and eighty-two, entitled an act to provide for the more efficient collection of the revenue to support the government, maintain the public schools, and to pay interest on the public debt, it shall be the duty of the attorneys for the Commonwealth to defend the suits, and if a case be decided against the Commonwealth it shall be his duty to appeal to the court above, and such appeal shall be a matter of right; and where an appeal is taken to the Court of Appeals it shall be the duty of the clerk of the Circuit Court from which the appeal is taken to deliver a copy of the record to the clerk of the Court of Appeals as soon as practicable, in like manner as is provided in the sixteenth section of chapter one hundred and seventy-eight of the Code of eighteen hundred and seventy-three in the cases of appeal to the Circuit Courts.

2. In all suits arising under the aforesaid acts, which may be brought into the Federal Courts, it shall be the duty of the Attorney-General to appear as counsel for the Commonwealth, or the collector of taxes, to defend such suits, and if the judgment be against the Commonwealth, or the collector of taxes, to take an appeal to the Supreme Court of the United States.

3. Any Commonwealth's attorney failing to carry out the provisions of this act shall be deemed guilty of a misdemeanor, and shall be fined not less than fifty nor more than one hundred dollars.

4. This act shall be in force from its passage.

"Coupon Killer No. 2," the act of January 26, 1882, already quoted, forbade any court to enjoin a collector from levying on a tax-payer's property after a tender of coupons. And the third section of an act, approved March 13, 1884, forbade any one to sue a collector for trespass if he levied for taxes after a tender of coupons. This act is as follows:

CHAP. 421, Section 3.—Of an ACT to amend the act approved January 26, 1882, entitled an act to provide for the more efficient collection of the revenue, &c.

Approved March 13, 1884.

§ 3. No action of trespass or trespass on the case shall be brought or maintained against any collecting officer for levying upon the property of any tax-payer who may have tendered in payment, in whole or in part, any coupons or paper purporting to be a coupon, cut from bonds of this State for such taxes, and who shall refuse to pay his taxes in gold, silver, United States treasury notes, or national bank notes. The suit contemplated by this act shall be commenced by a petition filed at rules, upon which a summons shall be issued to the collecting officer; and the said suit shall be regularly matured like other actions at law, and the coupons tendered shall be filed with said petition.

The Legislature also forbade absolutely the payment of license-taxes with coupons in any event. See *Royall* v. *Virginia*, 116 U. S. R. So that, so far as her own courts were concerned, the State had guarded and barricaded herself very effectually against coupons. But this court, in April, 1885, decided *Poindexter* v. *Greenhow*, 114 U. S. R., and that decision was followed by kindred decisions in *Barry* v. *Edmunds*, 116 U. S. R., 550; *Chaffin* v. *Taylor*, *ib.*, 567; and *Royall* v. *Virginia*, *ib.*, 572. It was then apparent that the coupon had been *scotched merely*, not *killed*, and further legislation was had, providing that if any collector was held liable in damages for levying on a tax-payer's property after a tender of coupons, those damages should be paid out of the State treasury. This act is as follows:

CHAP. 216.—An ACT authorizing a board, consisting of the Attorney-General, Secretary of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, to allow to tax collecting officers losses and expenses incurred in collecting or attempting to enforce or settle taxes due the Commonwealth.

Approved February 24, 1886.

1. Be it enacted by the General Assembly of Virginia, That upon the application of any officer charged with the duty of collecting or settling taxes due the Commonwealth, a board, consisting of the At-

torney-General, Secretary of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, shall be authorized to ascertain and allow to such officer such sum or sums of money as they may deem just and proper to cover any liability and expenses incurred by, and any loss or damage accrued to such officer, as the result of his collecting or attempting to collect, enforce, or settle taxes due the Commonwealth; and for the amount so ascertained and allowed, the Auditor shall draw his warrant in favor of such officer upon the Treasurer, and the same shall be paid out of money in the treasury not otherwise appropriated. The said board may prescribe rules and regulations in reference to such applications and allowances if they shall deem proper so to do; but no such allowance shall be made unless the said board shall be satisfied that such officer used due diligence in protecting and defending the interests of the Commonwealth in the matter touching which such allowance is asked for.

2. In case any such allowance is applied for by the Auditor, it shall be competent for the other members of said board to pass upon and allow the same with the same effect as if the Auditor were not a member of said board; but the Auditor shall not act as a member of said board in passing upon his own claim.

3. This act shall be in force from its passage.

The court is asked to refer to 29th Federal Reporter, p. 245, and see what is said there by the Attorney-General of the State concerning the purpose which was had in view by the passage of this act.

Next the Legislature passed the statutes already set out, forbidding the use of expert testimony and requiring the production of the bond. Next they provided that any one who gave the benefit of his professional knowledge to any one asserting legal rights based upon coupons should be guilty of barratry and be disbarred, and that whoever, not being a lawyer, should give any one assistance in making good his rights, based upon her coupons, should be guilty of champerty and fined $300, with imprisonment for sixty days. These acts are as follows:

CHAP. 238.—An ACT to define and punish Champerty.

Approved February 26, 1886.

1. Be it enacted by the General Assembly of Virginia, That any person who shall solicit, procure or induce, or become a party to soliciting, procuring or inducing, any suit or action to be brought, any petition to be filed, or any motion to be made against the State of Virginia, or any citizen thereof, by verbal representation, or by writing or printing, shall be deemed guilty of the offence of champerty, and upon conviction thereof shall be adjudged guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred

nor more than three hundred dollars for each offence, or by imprisonment for not more than sixty days, or by both, in the discretion of the jury.

2. This act shall be enforced from its passage.

CHAP. 347.—An ACT to define and punish Barratry.

Approved March 1, 1886.

1. Be it enacted by the General Assembly of Virginia, That any person licensed to practice law in any of the courts of this Commonwealth, who shall solicit, procure or induce, or become a party to soliciting, procuring or inducing, any suit or action to be brought, any petition to be filed, or any motion to be made against the State of Virginia, or any citizen thereof, by verbal representations, or by writing or printing, shall be deemed guilty of the offence of barratry.

2. That when, upon the complaint of the State, through any of its officers, or of any other defendant in a suit or petition, it shall appear to the Commonwealth's attorney, in any court of the Commonwealth, that there is reasonable ground to suspect the perpetration of such offence, it shall be his duty to summon the plaintiff on petition, his agent or agents, and any other witness he may think proper to summon, to testify in the case; and if it shall appear that the plaintiff or petitioner's counsel has solicited, procured or induced such suit or petition, or become a party thereto, then it shall be the duty of the court to declare such counsel guilty of barratry; and it shall revoke his license, and disbar him forever from practicing law in the courts of this Commonwealth.

3. This act shall be enforced from its passage.

They then, to meet *Royall* v. *Virginia*, and reserve some hope for license-taxes, provided that when coupons were tendered for a license-tax they should be received for verification only; but while verification was going on the party should do no business (verification having already been made impossible).

Finally, the *coup de grace* was given by the act under consideration in this suit, known through the public press as the "Coupon Crusher."

After this record, argument to show that the act is repugnant to the Constitution is unnecessary. The record speaks for itself.

JURISDICTION AS DEPENDING ON THE AMOUNT INVOLVED.

I take up, here, the question of jurisdiction as it depends upon the pecuniary amount involved in the suit. The petitioners insist that $2,000 are not involved in the suit, because no one of the tax-payers

to whom the complainants sold coupons owed as much as $2,000 of taxes, and they claim that complainants depend, for showing that $2,000 are involved, upon bunching together separate claims, amounting in the aggregate to $2,000, but no one of which amounts to that sum.

We insist that this is a total misconception of the suit. The complainants are in nowise concerned with what amount of injury will be done to any particular person to whom they have sold coupons by putting this act into force. Their complaint is that if the officers of the State are permitted to put it into force, the result will be a loss to them of more than $2,000. It is to restrain these officers from putting an unconstitutional act into force, which will cause them a loss of more than $2,000, that they asked the intervention of the court.

This question is to be looked at from two standpoints:

First, from the standpoint of the coupons actually sold.

Second, from the standpoint of those on hand and unsold.

As to those sold, the complainants say that if the officers of the State put this act into force it will result in all the coupons they have sold being condemned as spurious and confiscated as such, when they are, in point of fact, genuine; and that their vendees will then make reclamations on them for the money they paid for the coupons, and that these reclamations will amount to more than $2,000.

The petitioners reply that it was settled by this court, in *Parsons* v. *Marye*, 114 U. S., that when a vendor sold these coupons he parted with his interest in them, and that it is therefore impossible that any reclamations can be made upon the complainants; that the purchasers took them *cum onere*, and if they are condemned as spurious and confiscated the purchasers must stand the loss.

We reply, first: Suppose this be true; what more would it be than error in the Circuit Court, to be corrected on writ of error? What would it be but a mistaken application by the Circuit Judge of the principle announced by this court in *Parsons* v. *Marye?* Upon what principle could the jurisdiction of the Circuit Court be attacked for this reason on *habeas corpus?*

But we reply, second, that nothing that was said by the court in *Parsons* v. *Marye* can be fairly referred to as having any effect upon this case. What was said by the court in *Parsons* v. *Marye* was addressed to the state of facts then before the court, and was intended to be limited in its effect to that state of facts. Now, that state of facts is the converse of the state of facts involved in this case. In that

case Parsons was seeking *affirmative* relief. He was seeking to force his coupons into the treasury; whilst in this case nothing of the sort is sought. The complainants in this case are seeking simply and only to have officers restrained and enjoined from trespassing on their rights under unconstitutional laws. The cases bear no analogy whatever to each other, but are antipodes.

A very different state of facts exists now from what existed when *Parsons* v. *Marye* was decided. Since then the act of May 12th, 1887, has been passed, which provides for condemning all genuine coupons as spurious and confiscating them. Now it is a fixed principle of the law that when a person sells a piece of negotiable paper he makes an implied contract that it is not a forgery. Therefore when the complainants sold their coupons they entered into an implied contract with each one of their vendees that they would return him his money if the coupons sold to him proved to be counterfeit. If, then, this act were put into force, all the coupons they have sold will be condemned as spurious and taken away from their vendees, and they will certainly come back upon complainants for the money paid for the coupons.

It may be argued that complainants would not be estopped by the judgment in the suit between the State and the tax-payer that the coupons were spurious, for the reason that they were not parties to that suit. I will not stop to argue whether they would be or not. Certainly the condemnation and confiscation would give the vendees sufficient cause to demand restitution of their purchase-money; and the bill, which is uncontradicted, avers that they will make this demand, and that the demand will result in a loss of more than $2,000 to the complainants. It may be that this loss will result from the judgments to be entered in the suits; it may be from the expense complainants will be put to in defending themselves against their vendees. However it may arise is of no consequence here. It is sufficient for the jurisdiction of the court that the bill avers it will cause a loss of more than $2,000 to the complainant, and that the averment stands uncontradicted.

But let us see how the case stands as to the coupons unsold. The complainants aver that they have on hand a large quantity of these coupons owned by them and unsold; that if the defendants are allowed to put this act into force they will be unable to sell any more of them, and that the loss accruing to them from this source will be more than $2,000. This averment is contained in the original bill, and in the first amended bill, filed July 28th, 1887. The cause was

heard upon these two bills alone, the restraining order which was violated being granted upon the first of them. The averments stand uncontradicted, and must therefore be taken to be true. So far, therefore, as the unsold coupons are concerned, the case comes down to this. The complainants say that if this act is put into force it will injure them and cause them a loss of $2,000 *on the unsold coupons*, and that they had no adequate remedy at law. If this was true they were entitled to an injunction; if not true their bill was to be dismissed. Clearly, it was the duty of the chancellor to stay the hands of the defendants until the truth of complainants' allegations could be enquired into. If at the hearing they proved their allegations to be true as matter of fact, they would have their injunction. If, however, the defendants proved that they would not suffer a loss of $2,000 their bill would be dismissed.

The petitioners insist that the tax-payers to whom complainants sold coupons are necessary parties to the suit, and as the liability of the complainants to them results from the contracts made by them with these tax-payers respectively, and the amount involved in any one of these contracts is less than $2,000, it follows that the complainants cannot aggregate the several amounts for which they are liable by their separate guarantees so as to make the sum of $2,000.

No judgment has been rendered against anybody, and the complainants were not seeking to enjoin any judgments. They had no complaint against the tax-payers, and the tax-payers had none against them. Their cause of complaint was simply this: that the officers of the State were about to put into execution unconstitutional laws, and by this course of action they would inflict upon the complainants a loss of more than $2,000. The defendants are the Commonwealth's attorneys; the owners and guarantors of the coupons are the complainants. The controversy is simply between the complainants and these Commonwealth officers. Whether the damage which they will inflict upon the complainants by the course of action which they propose, to wit: carrying into effect this unconstitutional act, may result in a loss of $2,000 by their action in one case only or in a series of cases is a matter of no consequence. They are the parties about bringing the suits. It is against them that the complainants make their complaint, and not against the tax-payers, and if the result of their course will be to damage the complainants $2,000, then the court clearly had jurisdiction of the case. And, moreover, the court cannot close its eyes to the fact that the conduct complained of and

the proceedings to be enjoined are but parts of one scheme, the end and object of which is to deprive the complainants of the rights secured to them by their contract with the State of Virginia. The complainants are seeking to protect themselves against that scheme as a whole.

The petitioners seek to bring this case within the principle of such cases as *Shufeldt* v. *Gibson*, 122 U. S. R., 27. In so doing they misconceive the aim of the suit. If this case falls within the principle of any case that this court has decided, it is that of *Market House Company* v. *Hoffman*, 101 U. S., 112.

Suppose I were the owner of four powder magazines, each worth $1,000 only, conveniently situated with respect to each other, and that I had an implacable enemy who resided near me who was a consummate master of the laws governing light and heat. Suppose this enemy should arrange a series of mirrors in such a way as to concentrate the sun's rays to a focus on each of my magazines, with the intention of blowing them all four up, either simultaneously or at successive intervals, would the fact that I would be injured $1,000 only through the loss of one of my magazines prevent me from applying to the Circuit Court for an injunction?

I have had the record of *Osborn* v. *The Bank* printed, and a copy of it is bound up with each copy of this brief. The court will perceive that the Treasurer of Ohio was committed for contempt of court in that case for disobeying an order of the Circuit Court. That was a suit to enjoin the officers of the State of Ohio from executing an unconstitutional law, and is, therefore, on all fours in every respect with this. The printed copy of the record shows that there is a great deal of most important matter in the case which Mr. Wheaton failed to report; as, the imprisonment of the Treasurer of the State for contempt, and the appointment of sequestrators to go into the State's treasury and take possession of the money which had been taken from the vaults of the bank, which was done. *Allen* v. *B. & O. R. R. Co.*, 114 U. S. R., 311, is also an authority expressly in point.

ELEVENTH AMENDMENT.

We have been warned that an attempt will be made to reopen the question upon which the court divided in *Poindexter* v. *Greenhow*, to wit: that this is substantially a suit against the State, and therefore barred by the eleventh amendment. So far as the argument is concerned, I leave that question to Chief Justice Marshall's opinion in *Osborn* v. *The Bank*, and to the opinion of the court in *Poindexter* v. *Greenhow*.

But I may say that if there was ever a case in which the doctrine of *stare decisis* ought to be successfully invoked this is one. The doctrine of *Poindexter* v. *Greenhow* was subsequently affirmed by a unanimous court in *Barry* v. *Edmunds*, 116 U. S., 550; in *Chaffin* v. *Taylor*, *ib.*, 567; in *Royall* v. *Virginia*, *ib.*, 572; and in *Royall* v. *Virginia*, 121 U. S., 102, in which latter case the Chief Justice, who had been one of the dissentients, delivered the unanimous opinion of the court. The whole world was therefore justified in believing that the law had been unalterably settled by the judgment in *Poindexter* v. *Greenhow*, and it is not too much to say that millions of these securities have changed hands upon the belief that this question was at rest. It would be a hard thing on these people to find out now that their confidence had been misplaced.

Whilst I leave the argument of the question, whether the eleventh amendment forbids such suits as these, to Chief Justice Marshall's opinion in *Osborn* v. *The Bank* and to Mr. Justice Mathews' opinion in *Poindexter* v. *Greenhow*, it may not be amiss for me to state just what the decisions of this court upon that subject have been. When this cause was coming on for argument in the Circuit Court I became convinced that the record of *Osborne* v. *The Bank* contained matter that Mr. Wheaton had not reported, and I requested the clerk to hunt it up for me. It was in manuscript, having never been printed. I have had it printed, and a copy of it is bound up with each copy of my brief.

I shall state the case as the record discloses it, and without reference to Mr. Wheaton's report.

By an act of the Legislature, passed in 1819, the State of Ohio undertook to impose an annual tax of $50,000 upon each of the two branches of the Bank of the United States established in Ohio. The act provided that the Auditor of the State, Ralph Osborn, should issue his warrant to any person he might appoint, commanding him to collect from the bank the amount so charged against it. Osborn being about to put the act into force and effect, the bank applied to the United States Circuit Court for an injunction to restrain him. A preliminary injunction was awarded, which was served upon Osborn. Notwithstanding, he issued his warrant to one Harper, who went to Chillicothe and forcibly entered the vaults of the branch of the Bank of the United States situated there, and took from them the sum of $100,000. Whilst Harper was on his way to Columbus to turn the money over to the Treasurer of the State the injunction was served

upon him also, but he proceeded, nevertheless, and delivered it to the Treasurer of the State, who entered it upon the books of his office as so much of the State's money, and charged himself, as Treasurer, with it. He did not mix this money with other moneys of the State, but kept it in the treasury, separate and apart to itself in a trunk.

The cause proceeded to a final decree, in which the court decreed that the Treasurer should return the money to the bank, which he refused to do, and for refusing to do this the court attached and committed him for contempt. It also appointed three sequestrators, and directed them to seize this identical fund and bring it into court. The sequestrators went into the State's treasury, by virtue of the command of the order of sequestration, seized the fund and brought it into court, where it was returned to the bank, and the State's officers were perpetually enjoined from putting the act of the Ohio Legislature into force and effect.

I conceive this case to go as far as any one could ask in support of the proposition that the Federal courts will enjoin the officers of a State from executing any State law in violation of the Constitution and laws of the United States, and will visit upon all parties whatever all legitimate consequences of contumacy. The doctrine of this case was given full force and effect in *Davis* v. *Gray*, 16 Wall., 203. So, also, in *Allen* v. *B. & O. R. R. Co.*, 114 U. S., 311.

The Court has also fully established as a corollary that an officer of a State who executes a law of his State repugnant to the Constitution of the United States thereby makes himself a naked trespasser, and liable to the party injured for whatever injury he may cause him. This is established by the cases of *Poindexter* v. *Greenhow*, 114 U. S., 270; *Chaffin* v. *Taylor*, ib., 309; *Barry* v. *Edmunds*, 116 U. S., 550; *Chaffin* v. *Taylor*, ib., 567.

And it is well to refer here to a class of cases that has not heretofore been brought into this discussion but which is very pertinent to it. It was settled in the case of *Elliott* v. *Swartwout*, 10 Peters, 139, that a collector of customs who unlawfully exacted duties, and paid them over to the Government after protest from the person taxed, was personally liable to the party injured in a common law action of assumpsit for money had and received. See, also, *Conly* v. *Curtis*, 3 How., 236, and *Anson* v. *Murphy*, 109 U. S., 238.

If the officers of the General Government are responsible for their acts whilst acting in their official capacity, it is not easy to see why the officers of a State should enjoy an immunity.

To return to the subject. The doctrines stated, that the Federal courts will enjoin State officers from executing a State law repugnant to the Constitution of the United States, has never been denied in this court, but has been always affirmed. The principle has been most frequently applied in cases where the States have imposed taxes which impaired the obligation of contracts, such as—

Dodge v. *Woolsey*, 18 How., 331;
Wilmington R. R. v. *Reid*, 13 Wall., 264;
Tomlinson v. *Branch*, 15 Wall., 460;
Charleston v. *Branch*, 15 Wall., 470;
Branch v. *Charleston*, 92 U. S., 677;
Humphreys v. *Peques*, 16 Wall., 244;
Home of the Friendless v. *Rousse*, 8 Wall., 430;
Washington University v. *Rousse*, 8 Wall., 439;
McGill v. *Mathis*, 4 Wall., 143;

and many others too numerous to mention.

Proceeding upon the theory of *Osborn* v. *The Bank*, frequent efforts have been made to compel State officers affirmatively to do some act where the plaintiffs had some right involved that was protected by the Constitution of the United States. But the court has invariably drawn the line at this point, holding that to coerce State's officers into the performance of an act was to sue the State itself. The court seems to have taken this position first in the case of *Louisiana* v. *Jumel*, 107 U. S., 711. It is again acted on in *Cunningham* v. *R. R.*, 109 U. S., 446; and again in *Hagood* v. *Southern*, 117 U. S., 52.

In the case of *Cunningham* v. *R. R.*, 109 U. S., Mr. Justice Miller has defined the two principles and set out the boundary line between them very exactly, and after stating that the courts would enjoin officers from executing unconstitutional laws, he says, p. 455:

"On the other hand, in the case of *Louisiana* v. *Jumel*, decided at the last term, very ably argued and very fully considered, the court declined to go any further."

The same thing has been again done most carefully and exactly by Mr. Justice Mathews in *Hagood* v. *Southern*, 117 U. S., 52. The application in that case was for a decree to compel State's officers affirmatively to perform an act which, upon the well-settled principle, was refused. Speaking of the application, Mr. Justice Mathews says, p. 70:

"A broad line of demarcation separates from such cases as the present, in which the decrees require, by affirmative official action on

the part of the defendants, the performance of an obligation which belongs to the State, in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiff under color of authority unconstitutional and void. Of such actions at law for redress of wrong, it was said by Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick R. R.*: 'In these cases he is not sued as or because he is the officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him, page 452.' Of such cases that of *U. S.* v. *Lee*, 106 U. S., 196, is a conspicuous example, and it was upon this ground that the judgment in *Poindexter* v. *Greenhow*, 114 U. S., 270, was rested. And so the preventive remedy of equity, by injunction, may be employed in similar cases to anticipate and prevent the threatened wrong where the injury would be irreparable; and there is no plain and adequate remedy at law, as was the case in *Allen* v. *B. & O. R. R.*, 114 U. S., 311, where many such instances are cited."

The two principles and the dividing line between them are nowhere more clearly defined than by Mr. Justice Bradley in his dissenting opinion in *Poindexter* v. *Greenhow*. At page 335 he said:

"But, then, it will be asked, has the citizen no redress against the unconstitutional acts or laws of the State? Certainly he has. There is no difficulty on the subject. Whenever his life, liberty, or property is threatened, assailed, or invaded by unconstitutional laws he may defend himself in every proper way—by *habeas corpus*, by defence to prosecutions, by actions brought on his own behalf, by injunction, by *mandamus*. Any one of these modes of redress suitable to his case is open to him. A citizen cannot in any way be harassed, injured, or destroyed by unconstitutional laws, without having some legal means of resistance or redress. But this is where the State or its officers move against *him*. The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce the State into a fulfilment of its contracts. The one is an indefeasible right—a right which cannot be taken away; the other is never a right, but may or may not be conceded by the State; and, if conceded, may be conceded on such terms as the State chooses to impose."

The reasons for the distinction that is made are very apparent when

the facts of the respective cases are stated. Take, for instance, *Cunningham* v. *The Macon and Brunswick R. R.*, 109 U. S., 446. In that case the Legislature of Georgia had authorized the Governor to endorse in her name bonds of the Macon and Brunswick railroad. He did this to the extent of $1,950,000, for which the company executed a mortgage on its property to secure the bonds, which authorized the Governor to sell on default. Subsequently the Legislature authorized the Governor to endorse another issue of bonds, some of which latter issue became the property of the plaintiff. The company having defaulted, the Governor, under authority of the power vested in him by the act authorizing the endorsement, took possession of the property and road, and placed them in the hands of a receiver, and soon thereafter he had all sold to the State of Georgia, and a conveyance of the road and property was duly made to the State.

In the transaction the holders of the second issue of bonds received no recognition, and they accordingly filed a bill in the Circuit Court of the United States, attacking the sale as void, or, if not void, as voidable, and praying in substance that the property be taken from the State and applied according to the principles of equity to the creditors. The court refused to do this. Clearly an effort was made here to coerce officers of the State into performing affirmatively what the State was under an obligation to do. The whole gist of the reasoning which led the court to its conclusion is contained in the following extract from the opinion of the court, at page 457:

"In the case now under consideration the State of Georgia is an indispensable party. It is, in fact the only proper defendant in the case. No one sued has any personal interest in the matter, or any official authority to grant the relief asked. No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession."

Now the principle involved in this extract is involved in every case in which the court has refused relief. It is, that it will not coerce officers into performance of a duty that is the duty of the State and not of the officers. The officers do not owe the duty, and the State cannot be reached to coerce her. But there is nothing in this principle

to prevent the court from arresting an officer when he is about to commit a trespass, never mind in whose name the trespass is to be committed. The other cases, of *Louisiana* v. *Jumel* and *Hagood* v. *Southern*, will be found on examination to be founded upon exactly the same principle. In each the attempt was made to coerce the officers into performing a duty owed by the State.

I take it, therefore, to be very perfectly settled that the Federal courts will always enjoin State officers from executing an unconstitutional law when negative action only is asked for, but that they will never act at all when the application is to compel State's officers affirmatively to perform some duty owed by the State. The latter are virtually suits against the State, and barred by the eleventh amendment. The former are naked trespasses of individuals.

Indeed, the principle is as old as the common law, that though the sovereign cannot be coerced, yet his agents are personally liable if they carry out his commands contrary to the law. In Hale's Pleas of the Crown, vol. 1, p. 43, chapter 7, it is said: "As to the first of these subjections, the subject to his prince, it is regularly true that the law presumes the king will do no wrong, neither indeed can he do any wrong; and therefore, if the king command an unlawful act to be done, the offence of the instrument is not thereby indemnified; FOR THOUGH THE KING IS NOT UNDER THE COERCIVE POWER OF THE LAW, yet in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid if unlawful, and so renders the instrument thereof obnoxious to the punishment of the law."

I can see no ground, then, upon which the injuction prayed for in this suit can be held to be a suit against the State, unless it be attempted to make an exception of this case from the general rule, upon the ground that the suits contemplated by the "coupon crusher" are to be brought in the name of the State.

But to this it is to be replied that no proceedings against the State were asked for. The application was to restrain officers from putting an unconstitutional law into force and effect. No interests of any sort whatever had vested in the State. No application was made to divest her of anything whatever. What was the proceeding ordered in *Osborn* v. *The Bank* but a proceeding to collect money? And what difference is there in principle between one proceeding to collect money and another? What was the proceeding in *Allen* v. *B. & O. R. R.* but a proceeding to collect money? Osborn was seeking to obtain no

advantage for himself; he was seeking to collect money for the State. Allen was seeking no advantage for himself; he was seeking to collect money for the State. The proceedings in each case were to be in the name and for the benefit of the State. Osborn's warrant was not his command; it was the State's command. Allen's levy was not his levy; it was the State's levy. I can perceive no possible distinction between the two cases. If the suits contemplated by the coupon crusher should go to judgment, and the sheriff should levy executions, he would be liable as a trespasser. Is it to be said that the executive officer who puts the judgment into force may be held responsible, but that the court is powerless to prevent the wrong of a judgment being recorded?

It is too plain for argument, that the actings and doings of the Virginia authorities now under review have but one purpose, and that is to destroy the rights of property in her coupons had by those who own them, and to defy the Constitution of the United States and the solemn judgments of this court. It is left for this court to say whether their arbitrary action shall be the rule of conduct in Virginia or whether the same Federal law which governs in all the other States of this Union shall be submitted to there.

WM. L. ROYALL,
for the Marshal.

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THE RECORD OF

Osborn vs. The Bank of the United States,

9TH WHEATON'S REPORTS.

AS IT IS ON FILE IN THE CLERK'S OFFICE OF THE SUPREME COURT OF THE UNITED STATES,

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47462

Supreme Court of the United States.

RALPH OSBORN AND OTHERS

vs.

THE BANK OF THE UNITED STATES.

No. 19.

Pleas held at the court-house, in the town of Columbus,
page 1 on Wednesday, the fifth day of September, in the year of our Lord one thousand eight hundred and twenty-one.

Present—The Honorable Charles Willing Byrd, Esq., one of the judges of the Seventh Circuit Court of the United States within and for Ohio District.

Be it remembered, that heretofore, to wit—on the second day of the term of September, in the year of our Lord one thousand eight hundred and nineteen, came the president, directors, and company of the Bank of the United States, by Messrs. Creighton and Bond, their counsel, and on motion filed their bill against Ralph Osborne, Auditor of the State of Ohio, praying the court to enjoin the defendant from proceeding against complainants under and in virtue of the statute of Ohio, entitled "an act to levy and collect a tax from all banks, and individuals, and companies, and associations of in-
page 2 dividuals that may transact banking business in this State without being authorized to do so by the laws thereof"; and thereupon the court, having advised of and concerning the premises, do order that the injunction prayed for by the complainants in their bill be allowed, upon their giving and perfecting bond and security, pursuant to statute, in the penalty of one hundred thousand dollars. Bond executed and filed, and which said bill is in the words and figures following, to wit:

To the honorable the Judges of the Seventh Circuit Court of the United States for the Ohio District in Chancery now sitting:

Humbly complaining, respectfully showeth unto your honors, your orators, the president, directors, and company of the Bank of the

United States, that your orators, by a law passsed by the Congress of the United States, and approved by the President of the United States on the tenth day of April, eighteen hundred and sixteen, en-
page 3 titled "an act to incorporate the subscribers to the Bank of the United States," were made a body corporate and politic by their name and style aforesaid. That pursuant to the provisions of said statute the several previous requisitions therein mentioned being complied with, your orators some time in the autumn of eighteen hundred and sixteen commenced business under their name and style aforesaid in the city of Philadelphia; that among other provisions contained in the statute aforesaid the eleventh section thereof enacts certain rules, restrictions, limitations and provisions as fundamental articles of the constitution of the said corporation, one of which said articles, to wit, the 14th, is in the following words, to wit:

"The directors of the said corporation shall establish a competent office of discount and deposit in the District of Colum-
page 4 bia whenever any law of the United States shall require such an establishment; and also one such office of discount and deposit in any State in which two thousand shares shall have been subscribed or may be held, whenever, upon application of the Legislature of said State, Congress may by law require the same: provided the directors aforesaid shall not be bound to establish such office before the whole of the capital of the bank shall have been paid up; and it shall be lawful for the directors of the said corporation to establish offices of discount and deposit wheresoever they shall think fit, within the United States or the Territories thereof, and to commit the management of the said offices and the business thereof respectively to such persons and under such regulations as they shall deem proper, not being contrary to law or the constitution of the bank; or,
page 5 instead of establishing such offices, it shall be lawful for the directors of the said corporation from time to time to employ any other bank or banks, to be first approved by the Secretary of the Treasury, at any place or places that they may deem safe and proper to manage and transact the businees proposed as aforesaid, other than for the purposes of discount, to be managed and transacted by such offices, under such agreements, and subject to such regulations, as they shall deem just and proper," &c., &c., &c.

Your orators further state that under the provision of the said statute and the fundamental article aforesaid, the directors of the said corporation established in the State of Ohio two offices of discount and deposit, to wit—on or about the twenty-eighth day of January, eighteen hundred and seventeen, they established one at Cincinnati, in the Ohio district aforesaid, and on or about the thir-
page 6 teenth day of October, eighteen hundred and seventeen, they established one at Chillicothe, in said district of Ohio, which said two several offices went into operation and still continue to transact business at the places aforesaid. But now so it is, may it please your honors, although said two several offices were established as aforesaid, as well they might and lawfully could be, still the Legis-

lature of the State of Ohio aforesaid, contriving and intending how to injure and oppress your orators, and more especially to deprive them of their goods, despoil them of their moneys and effects, and completely check the existence and operation of the two several offices, established as aforesaid, passed at their last session, to wit—on or about the eighth day of February, eighteen hundred and nineteen, an act entitled "an act to levy and collect a tax from all banks and individuals, and companies and associations of individuals,
page 7 that may transact banking business in this State without being authorized to do so by the laws thereof;" by which said act it is in its preamble recited, "whereas the president and directors of the Bank of the United States have established two offices of discount and deposit in this State, at which they transact banking business by loaning money and issuing bills in violation of the laws of this State."

And by the first section of the said act it is, among other things, enacted in the words following, to wit: "That if, after the first day of September next, either the Bank of the United States or all or any of the said companies or associations shall continue to transact banking business within this State, they shall each severally be subject to and held liable to pay an annual tax, as follows, to wit: the Bank of the United States shall pay a tax of fifty thousand dollars per annum upon each office of discount and deposit at which
page 8 they may commence or continue to transact banking business within this State," &c.

And by the second section of the said act it is further enacted: "That upon the fifteenth day of September next, and afterwards upon the fifteenth day of September annually, the Auditor of State shall proceed to charge the Bank of the United States with a tax of fifty thousand dollars upon each office of discount and deposit at which they may continue to transact banking business within this State after the first day of September next, and so long as the Bank of the United States shall continue to transact banking business at any office of discount and deposit within this State"—which said tax is to be collected in manner following.

By the third section of said act it is enacted, in part, as follows, to wit: "That the Auditor of State, so soon as he shall have charged all or any one of the sums directed to be charged as a tax by
page 9 this act, shall make out his warrant, under his seal of office, directed to any person whom he may appoint in such warrant to execute the same, commanding him to collect the amount of tax in said warrant specified from the Bank of the United States," &c.

And by the fourth section of the said act it is, among other things, enacted: "That the person appointed to execute such warrant, and to whom the same shall be directed, shall enter the banking-house of the Bank of the United States, within this State, or the banking-house of any individual, company, or association against whom the warrant may be issued, and demand payment of the amount which, by his warrant, he is directed to collect. And if payment be not made, such

person shall immediately make a levy upon any money, bank notes, or other goods and chattels, the property of the bank, individual, company, or association against which the warrant may be
page 10 issued, or so much thereof as may be sufficient to satisfy the amount for which the warrant is issued. And the money or bank notes so taken shall be returned, and the goods and chattels levied upon shall be advertised and sold in the same manner as if taken by a sheriff or other officer upon a writ of *fieri facias*."

And by the fifth section of the said act it is provided: "That the person entering such banks, after demand and refusal of the payment of the tax aforesaid, if he cannot find in the banking-room any money, bank notes, goods, chattels, or other property of said banks, or individual company or association, whereon to levy to satisfy the tax aforesaid, it shall and may be lawful, and it is hereby made the duty of such person to go into each and any other room or vault of such banking-house, and every closet, chest, box, or drawer in such banking-house to open and search, and any money, bank notes,
page 11 or other goods and chattels, the property of said bank or individual, company or association, therein deposited, thereon to levy, or so much thereof as will satisfy the tax aforesaid, agreeably to the provisions of the fourth section of this act."

And there are other provisions contained in said act equally tending to injure and oppress your orators in manner aforesaid.

Your orators state that one Ralph Osborne, who resides at Columbus, in the State of Ohio aforesaid, is the Auditor of said State and the officer upon whom the execution of the last-referred-to act is enjoined; and your orators are informed and believe that the said Ralph Osborne, Auditor as aforesaid, daily gives it out in speeches that he will execute and enforce the provisions of the said act of Ohio against your orators—all which is evidently contrary to equity, the true spirit and meaning of the Constitution of the United States, and the act of the Congress of the United States aforesaid, whilst
page 12 at the same time it tends to the manifest injury and oppression of your orators, and virtually leads to the entire destruction and deprivation of the rights and privileges conferred upon your orators by the Constitution of the United States and the act of Congress aforesaid.

In tender consideration whereof, and to the end that your orators may be protected in the enjoyment of their rights and privileges aforesaid, and their moneys, property, and effects secured and guarded against all acts and doings under the act of the Legislature of Ohio aforesaid; and as, by the act of Congress aforesaid, your orators are entitled to be heard in this honorable court, they therefore pray your honors that the said Ralph Osborne, Auditor of Ohio aforesaid, and who is a citizen thereof, may be made defendant to this bill and held to answer the same as particularly as if the same were herein again repeated, and be thereto specially interrogated. And
page 13 the premises considered, your orators pray your honors to stay and enjoin said Ralph Osborne, Auditor as aforesaid,

and all others whom it may concern in anywise, from proceeding against your orators under and in virtue of the act of Ohio aforesaid, or any section, part or provision thereof, and particularly that your honors will enjoin said Ralph Osborn, Auditor as aforesaid, from charging the Bank of the United States, on the fifteenth day of the present month of September, or on the fifteenth day of September in any year hereafter, with a tax of fifty thousand dollars upon either of the offices established in the State of Ohio by the directors of said bank as aforesaid; that your honors will also enjoin said Ralph Osborn, Auditor as aforesaid, from making out any warrant or appointing or authorizing any person or persons to execute all, either, or any of the provisions of the said act of the Legislature of Ohio aforesaid, against your orators, or either of the offices established in the State of
page 14 Ohio as aforesaid, until your orators can be heard in the premises by this honorable court; and finally, that the said injunctions, so prayed for, may be made perpetual by your honors.

Your orators also pray that the said Ralph Osborn may be put under such restrictions and held to such security in the premises as may seem best calculated to effect the objects prayed for.

And your orators finally pray the writ of subpœna, together with all such other and further relief in the premises as the nature and circumstances of their case may require and to your honors appear just and reasonable. And they, as in duty, &c.

CREIGHTON & BOND,
Solicitors for Complts.

And thereupon the following subpœna in chancery issued, together with the endorsements thereon, viz.:

The United States of America, District of Ohio, set.—To
page 15 the Marshal of the District of Ohio, greeting:

You are hereby commanded to summon Ralph Osborn, Auditor of the State of Ohio, that he be and appear before the Judges of the Circuit Court of the United States, in and for the Seventh Circuit and District of Ohio aforesaid, at the court-house in the town of Chillicothe, on the first Monday in the month of January next, to answer The President, Directors, and Company of the Bank of the United States of a certain petition in chancery exhibited against him. And this he shall in nowise omit under the penalty of law. And have then there this writ.

Witness the Honorable John Marshall, Chief Justice of the United States, this fourteenth day of September, in the year of our Lord one thousand eight hundred and nineteen, and in the forty-fourth year of the American Independence.

Att.: HARVEY D. EVANS, Clk.

Endorsements.

This suit is brought to enjoin defendant from proceeding
page 16 in anywise against complainants, under and in virtue of the act of Ohio entitled "an act to levy and collect a tax from all banks and individuals and companies and associations of individuals that may transact banking business in this State without being authorized to do so by the laws thereof," or under and in virtue of any section, part or provision thereof; and also to enjoin said defendant from charging the Bank of the United States, on the fifteenth day of the present month of September, or on the fifteenth day of September in any year hereafter, under the act of Ohio aforesaid, or under any section, part or provision thereof, with a tax of fifty thousand dollars upon either of the offices of discount and deposit established by the directors of the Bank of the United States in the State of Ohio; and also to enjoin said defendant from making out any warrant or appointing or authorizing any person or persons,
page 17 under the statute of Ohio aforesaid, or under any section, part or provision thereof, to execute all, any, or either of the provisions of said act against said complainants, or against either of the offices of discount and deposit established by the directors of the Bank of the United States in the State of Ohio.

CREIGHTON & BOND,
Sol. for Complts.

Bond with security given for one hundred thousand dollars, conditioned as the law directs.

Att.: HARVEY D. EVANS, Clk.

Sep. 14, 1819.

I hereby authorize and empower James McDougal to serve this writ of injunction and summons.

JNO. HAMM,
Marshal of Ohio.

And afterwards, to wit: On the eighteenth day of September, in the year of our Lord one thousand eight hundred and nineteen aforesaid, the following injunction issued, viz.:

The United States of America, District of Ohio, set.—To
page 18 Ralph Osborn, Auditor of the State of Ohio, his counsellors, attorneys, solicitors and agents, greeting:

Whereas it has been represented to us in our court of chancery, sitting in Chillicothe in and for the Seventh Circuit and District of Ohio, on the part of The President, Directors, and Company of the Bank of the United States, complainants, that they have lately exhibited their bill of complaint into our said court of chancery against you, the

said Auditor, Ralph Osborn, defendant, wherein it was prayed that you, the said Ralph Osborn, Auditor of Ohio aforesaid, and a citizen of the said State, should be enjoined as Auditor aforesaid; and that all other persons whom it may concern may be enjoined from proceeding in anywise against the said complainants under and in virtue of the act of Ohio entitled "an act to levy and collect a tax from all banks and individuals and companies and associations of
page 19 individuals that may transact banking business within this State without being authorized to do so by the laws thereof," or under any section, part or provision thereof, and more particularly that you, the said Ralph Osborn, Auditor as aforesaid, may be enjoined from charging the Bank of the United States, on the fifteenth day of the present month of September, or on the fifteenth day of September in any year hereafter, with a tax of fifty thousand dollars upon either of the offices established in the *the* State of Ohio by the directors of the said bank as aforesaid; that you, the said Ralph Osborn, should also be enjoined, as Auditor as aforesaid, from making out any warrant or appointing or authorizing any person or persons to execute all either, or any of the provisions of the said act of the Legislature of Ohio against the complainants, or either of the offices established in the State of Ohio, until the complainants can be heard
page 20 in equity by the said court.

We do therefore, in consideration of the premises aforesaid, strictly enjoin, order and command you, the said Ralph Osborn, Auditor as aforesaid, and all and every the persons before mentioned, under the penalty of the law, that you and every of you do absolutely desist and refrain from proceeding in anywise against the complainants, under and by virtue of any section, part or provision thereof, and particularly from charging the complainants, on the fifteenth day of September of the present year, or on the fifteenth day of September of any subsequent year, with a tax of fifty thousand dollars upon either of the offices established in the State of Ohio by the *the* said complainants.; and also from making out any warrant or appointing any person or persons to execute all, either, or any of the provisions of the said act of the Legislature of Ohio against the com-
page 21 plainants, or either of their offices within this State, or from levying and collecting the tax by the said act imposed on the complainants, or from paying over, by order or otherwise, any moneys received for said tax which shall have been or may be collected under the provisions of the said act into the treasury of the State of Ohio, or from making report of the same to the Legislature aforesaid, in your general report of the receipt of taxes, until the hearing of this cause by our court of chancery of the United States for the Seventh Circuit and District aforesaid.

Witness the Honorable John Marshall, Chief Justice of the United States of America, this eighteenth day of September, in the year one thousand eight hundred and nineteen, and in the 44th year of the American Independence.

Att.: HARVEY D. EVANS, Clk.

Return of Service.

District of Ohio, Ross county, ss.:

James McDougal, the deponent, of Ross county aforesaid,
page 22 being of lawful age and first duly sworn, deposeth and saith that on the fifteenth day of September, about sunrising, in the year of our Lord one thousand eight hundred and nineteen, he served the subpœna in chancery annexed to this affidavit, together with the endorsements thereon appearing, the one signed with the names of Creighton & Bond, sol. for complainants, the other attested by Harvey D. Evans, clk., upon Ralph Osborn, the person in the said process named, and also at the same time left with the said Ralph Osborn a copy of the said subpœna in chancery, with the said endorsements, the copy of which subpœna and endorsements were truly made; that he served the said process by virtue of an authority, also endorsed on the said subpœna, signed Jno. Hamm, Marshal Ohio.

This deponant further saith that afterwards, to wit: on
page 23 the eighteenth day of September, in the year aforesaid, he served the writ of injunction, also attached to the said subpœna, and the order of court to the said writ subjoined in the case of The President, Directors, and Company of the Bank of the United States against Ralph Osborn, Auditor of Ohio, upon the said Ralph Osborn, leaving with him at the same time a true copy of said writ and order. He also served the same upon John S. Harper on the same day, leaving a copy of the writ aforesaid and order of court with the said Harper, who was then on his way to Columbus with the money and funds, which were the subject-matter of the subpœna, order of injunction and writ of injunction aforesaid, as this deponent understood. That the process last mentioned was served upon the said Ralph Osborn before the said Harper had reached Columpage 24 bus, aforesaid, with the money and funds before mentioned.

And further this deponent saith not.

JAMES McDOUGAL.

Sworn to in open court, Jan'y term, 1820.

HARVEY D. EVANS, Clk.

And afterward, to wit: at January term, in the year of our Lord one thousand eight hundred and twenty, this cause was continued.

And afterwards, to wit: at rules held in the clerk's office of the court aforesaid, in the months of February, March, April, May, June, July, and August, in the year last aforesaid, this cause was continued.

And afterwards, to wit: at September term, in the year last aforesaid, on motion of complainants, leave is given them to file a supplement and amendment to the bill exhibited in this cause, and to make

new parties, which was accordingly forthwith filed; and Hiram Merrick Curry, as late Treasurer of Ohio and in his private individual character, Samuel Sullivan, as present Treasurer of Ohio
page 25 and in his private individual character, the said Ralph Osborn, as Auditor of the said State and in his private individual character, and John S. Harper, were made defendants thereto.

Whereupon, on motion of the said complainants, it was ordered by the court that an injunction be granted to the said complainants to enjoin and restrain the defendants, and particularly the defendant Sullivan, from negotiating, delivering over, or in any manner parting with or disposing of, the specific and identical bank notes and coin, of which the sum of one hundred thousand dollars, or any part thereof consisted, which was seized by John S. Harper on the seventeenth day of September, eighteen hundred and nineteen, from complainants, and by him subsequently delivered over to the defendant Osborn or Curry, and by the said Curry subsequently delivered over
page 26 to the said defendant Sullivan, and now in his possession, of which said sum six thousand dollars were in specie other than American gold, three thousand eight hundred and thirty dollars in American gold, two thousand and twenty dollars in notes of the complainants, payable at their banking-house in Philadelphia, and seventy-eight thousand one hundred and fifty dollars in their notes, payable at their offices of discount and deposit at Chillicothe, until the further order of the court; and it is further ordered that a subpœna issue against the defendants, returnable to the eighth day of this term, and that a copy of said order issue.

Said amendatory and supplemental bill is in the following words and figures, viz.:

To the honorable the Circuit Court of the U. States for the District of Ohio in chancery sitting:

Humbly complaining, show unto your honors, your orators, The President, Directors, and Company of the Bank of the U.
page 27 States, that on ——— the day of September, 1819, your orators exhibited in this honorable court, against a certain Ralph Osborn, their bill of complaint, to which they pray this may be considered as a supplement and amendment, by which they alleged the purpose of the said Osborn to be to proceed to the enforcement and collection of a certain illegal and unconstitutional tax, imposed by the Legislature of Ohio, of fifty thousand dollars upon each of the two offices of discount and deposit established by your orators within this district; and prayed the award of an injunction to restrain the said Osborn from collecting the said tax, which was accordingly ordered by this honorable court, and, as your orators are advised, was duly issued and served upon the said Osborn, his agents, &c., all which will appear by the bill, order for injunction, subpœna, injunction thereon endorsed, and other proceedings in the said suit, to all of

which your orators beg leave to refer, and pray that this
page 28 may be considered as annexed thereto.

And your orators further show unto your honors, that subsequent to the service of the said injunction, to wit: on the 17th day of September, 1819, the said Osborn, having employed a certain John S. Harper to collect the tax aforesaid, the said Harper proceeded, by violence, to enter the office of your orators at Chillicothe, and the vaults situated in the said office, and did forcibly take therefrom one hundred thousand dollars in specie and bank notes belonging to or in deposit with your orators, although your orators expressly charge that, prior to the said seizure, and also at the time thereof, the said Harper well knew, and was duly notified, that the injunction aforesaid had been granted by this honorable court, and that he was acting in violation thereof; that of the said sum of $100,000 forcibly seized as aforesaid, sixteen thousand dollars thereof were in specie other than American gold, $3,830 in American gold,
page 29 $2,020 in notes of your orators, payable at their banking-house in Philadelphia, and the residue of $78,150 was in the notes of your orators, payable at their said office in Chillicothe; that the said notes, whether payable at the one place or the other, aforesaid, are what are commonly called "bank notes," payable to bearer, and capable of being negotiated by delivery; that one hundred of the said notes of each letter E, F, G, I, or J, K, L, M, and numbered from No. 301 to 400 inclusive, for twenty dollars each note, and amounting together to $8,000, are all that your orators are enabled to describe of the said notes; that your orators are unable to set forth any descriptive circumstances of the other of the said bank notes so seized as aforesaid, which they cannot distinguish from other bank notes which have been issued and put into circulation, and they therefore require of the defendants to set forth and discover the letters, numbers, and other descriptions of the said bank notes.

page 30 And your orators further show that after the said Harper seized the aforesaid sum of $100,000, he delivered the same specifically to a certain Hiram Merrick Curry, or to the defendant Osborn, who, your orators expressly charge, had full notice of the illegal seizure of the said sum from your orators as aforesaid, and who, they also charge, paid no consideration whatever to the said Harper or any other person for the said $100,000, but who received the same for the sole purpose of keeping it in safe deposit. That accordingly the said Curry or Osborn did preserve the identical notes and coin, forcibly taken from your orators as aforesaid, separate and apart from all other moneys and notes in his possession; and on the ——— day of ————, 1820, he, the said Curry, did deliver the said notes and coins to a certain Samuel Sullivan, who, your orators expressly charge, had full notice of the said notes and coin having been illegally and forcibly taken from your orators, and who likewise paid
page 31 no consideration therefor, but received the same for the sole purpose of safe-keeping; and accordingly the said Sullivan has constantly kept the identical notes and coin so taken, as aforesaid,

from your orators, separate and apart from all other moneys and notes, and is now capable of producing them, subject to the order and decree of this court. That at the time when the said Harper delivered over to the said Curry the said notes and coin, the said Curry was the Treasurer of the State of Ohio; and at the time when the said Curry delivered the same over to the said Sullivan he was the successor of of the said Curry as Treasurer of Ohio; but the nature and character of the whole transaction utterly forbids the supposition that either the one or the other, when receiving the said notes and coin, was acting in his capacity of Treasurer and in conformity to the Constitution and laws of the land. Nevertheless, your orators pray the said
page 32 Curry, as late Treasurer of Ohio and in his private individual character, and the said Sullivan, as present Treasurer of Ohio and in his private individual capacity, and the said Ralph Osborn, as Auditor of the said State and in his private individual character, and the said John S. Harper, to be made and considered defendants to this suit.

And your orators had well hoped that a sense of justice, of order, and of due subordination to the Constitution and laws of the U. States would have prevailed on the said deft's to restore the said notes and coin to your orators, with interest thereon from the period of the forcible seizure thereof, as aforesaid. But now so it is, may it please your honors, &c. In tender consideration whereof, &c. To the end, therefore, that the said defendants may on their corporal oaths make as full, true, and perfect answer to the allegations of this bill as if the same were herein set forth again in the form of inter-
page 33 rogatory, and more especially that they may severally discover, on their respective corporal oaths, the numbers, letters, dates, and amounts respectively of the said bank notes, and all other descriptive circumstances relating to them and to the said coin, whether the said Sullivan has not now possession of the identical notes and coin taken as aforesaid, and if not, when, how, and to whom did he transfer the same; that by the decree of this honorable court they may be decreed to restore and deliver to your orators the identical notes and coin so seized from them as aforesaid, with interest thereon from the day of the seizure thereof, so that your orators may cancel the said notes or make such other use thereof and of the said coin as they may think proper; that in the mean time the said defendants, particularly the said Sullivan, may be enjoined and restrained from negotiating, delivering over, or in any manner parting with or disposing of the said bank notes and coin, or any part thereof; that the said defendants may be also severally and jointly enjoined and restrained from proceeding under the law, or pretended law of Ohio, referred to in the original bill, to collect any tax or pretended tax now or hereafter due and payable from your orators upon either of their offices situated in this district, and that your orators may have such other and further relief as shall be deemed agreeable to equity and good conscience. May it please your honors, &c.

BOND, SCOTT & CLAY, p. q.

And thereupon the following subpœna in chancery issued, together with the endorsement thereon, viz.:

The United States of America, District of Ohio, set.—To
page 34 the Marshal of said District, greeting:

We command you to summon Hiram Merrick Curry, as late Treasurer of Ohio and in his private individual character; Samuel Sullivan, present Treasurer of Ohio and in his private and individual character; Ralph Osborn, Auditor of the State of Ohio and in his private individual capacity; and John S. Harper, if they be found in your bailiwick, to appear before the Judges of the Circuit Court of the United States for the Seventh Circuit and District of Ohio aforesaid, at Columbus, on the eighth day of the present term of September, to answer the President, Directors, and Company of the Bank of the United States, of a certain original bill, amended bill, and supplemental bill, in the said court exhibited against them; and this they shall in nowise omit, under the penalty of the law. And have then there this writ.

Witness, the Honorable John Marshall, Chief Justice of
page 35 the United States of America, this seventh day of September, 1820, and in the 45th year of the independence of
[Seal.] the United States of America.

Att.: HARVEY D. EVANS, Clk.

Endorsement.

To enjoin and restrain the defendants, and particularly the defendant Sullivan, from negotiating, delivering over, or in any manner parting with or disposing of, the specific and identical bank notes and coin of which the sum of one hundred thousand dollars consisted, or any part thereof, which was seized by John S. Harper on the 17th day of Sep., 1819, from the compl'ts, and by him subsequently delivered over to the defendant Osborn or Curry, and by the said Curry subsequently delivered over to the said defendant Sullivan, and now in his possession, of which said sum $16,000 were in specie other than American gold, $3,830 in American gold, $2,020 in notes of the compl'ts, payable at their banking-house in Philadelphia, and
page 36 $78,150 in their notes, payable at their office of discount and deposit in Chillicothe, until the further order of the court.

Sep. 7, 1820.

Att.: HARVEY D. EVANS, Clk.

Bond, Clay & Scott, for Compl'ts.

Marshal's Return.

August 7, 1820. Then served this subpœna on Ralph Osborn, Hiram Merrick Curry, Samuel Sullivan, together with a true copy of

the original amended and supplemental bill on Ralph Osborn, on the 8th of Sept'r, 1820; also served this summons on John S. Harper on the 11th Sep., 1820.

J. VICKERS, Dep'ty Marshal.

And further proceedings were continued.

page 37

And afterwards, to wit: at rules held as aforesaid, in the month of September, in the year last aforesaid, came the complainants by their counsel and entered a rule on the defendants to appear and answer their bill within ninety days.

And afterward, to wit: at rules held as aforesaid, in the month of October, in the year last aforesaid, this cause was continued.

And afterward, to wit: at rules held in the clerk's office of the court aforesaid, in the month of November, in the year (1820)

page 38 last aforesaid, came the defendant, Hiram Merrick Curry, by Messrs. Swan & Cory, his counsel, and filed his answer to the bill of the complainants, which is in the words and figures following, viz.:

The separate answer of Hiram Merrick Curry, one of the defendants, to the bill of complaint exhibited against him and others by The President, Directors, and Company of the Bank of the United States, complainants.

The said defendant, saving and reserving to himself now and at all times hereafter all manner of benefit and advantage of exception to the manifold uncertainties and imperfections in said complainants' said bill of complaint, contained for answer thereunto, or unto so much thereof as this defendant is advised is material or necessary for him to make answer unto, he answers and says: That on or about the nineteenth or twentieth day of September, in the year of our Lord one thousand eight hundred and nineteen, defendant John

page 39 S. Harper delivered to this defendant, then Treasurer of the State of Ohio, the following sums of money, which this defendant was informed and believed was a tax levied by the branch banks of the United States located in this State by virtue of an act of the State of Ohio, entitled "an act to levy and collect a tax from all banks and individuals and companies and associations of individuals that may transact banking business in this State without being authorized so to do by the laws thereof," to wit: in silver coin the sum of sixteen thousand dollars, in gold coin the sum of three thousand eight hundred and thirty dollars, and in bank notes of the Bank of the United States and its branches the sum of seventy-eight thousand one hundred and seventy dollars, amounting in all to the sum of ninety-eight thousand dollars.

This defendant, at the time said sum of money and bank

page 40 notes was so delivered to him by said defendant Harper, was doubtful whether under all the circumstances he ought to

retain said sum of money within his individual control or pass it to the credit of the State upon the treasury books.

This defendant, after consulting counsel learned in the law, and being advised by them, did carry said amount to the credit of the State. Nevertheless, this defendant, so long as he continued in said office of Treasurer carefully deposited said money and bank notes in a trunk and kept the same separate from the other funds of the treasury; nor did this defendant ever appropriate any of said money or bank notes to the discharge of demands against the treasury, nor to any other purpose.

This defendant had not at this time access to said monies and bank notes, nor can he designate said bank notes by their denominations, letters or numbers, nor particularly say whether said bank
page 41 notes were payable at the principal bank or its branches.

This defendant, in further answering, says that some time in the month of January or February in the present year, the Legislature of the State of Ohio, by a select committee of the House of Representatives, seized upon the monies, bank notes, &c., of the treasury, soon after which this defendant resigned the office of Treasurer of said State, and the monies and bank notes mentioned in said bill, then being separate from the other funds of the treasury, came to the hands of Samuel Sullivan, the present Treasurer of said State.

This defendant, in further answering, saith that said Sullivan, as Treasurer, executed his receipt to this defendant for said monies and bank notes so delivered to this defendant by Harper, since which time this defendant knows nothing about said coin and bank notes, other than he has been informed by said Sullivan that since said monies and bank notes came to the hands of said Sullivan, Treasurer
page 42 as aforesaid, he, through mistake, paid out a small sum of the silver coin aforesaid, which has been replaced; and that the residue of said coin and bank notes are kept by him separate from the other funds of the treasury, and that he has not appropriated any part thereof to the discharge of demands upon the treasury.

And this defendant denies all manner of fraud and unlawful combination wherewith he stands charged in and by said bill of complaint, without that *that* there is any other matter or things material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered unto, confessed, or avoided, traversed or denied, the same is true.

And this defendant prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained, &c.

HIRAM M. CURRY.

SWAN & CORY, pro def't.

The State of Ohio, Franklin county, ss.:

Personally came Hiram Merrick Curry, who made the above answer, and, being sworn, saith that the matters and
page 43 things in the above answer, so far as related to be within his own knowledge are true, and so far as therein set forth

to have been derived from the information of others, he believes the same to be true.

Subscribed and sworn to this 30th day of October, A. D. 1820, before me.

ELI C. KING,
Justice of the Peace. [Seal.]

And afterwards, to wit: at rules held in the clerk's office of the court aforesaid, in the month of December, in the year last aforesaid, this cause was set for hearing as to the defendant Curry upon bill and answer and decree *pro confesso* as to the other defendants for want of an appearance and answer.

And afterwards, to wit: on Tuesday, the second day of the term of January, in the year of our Lord one thousand eight hundred and twenty-one, it appearing to the court here that Samuel Sullivan, one of the defendants in this cause, has failed and neglected to answer the complainant's bill, although duly served with subpœna re-
page 44 quiring him to answer it, and altho' ruled so to do; and it further appearing that the said defendant is by the said bill called on for a discovery: it is, therefore, on motion of the complainants aforesaid, by the their counsel, ordered that an attachment issue against said defendant, returnable to Thursday next, for a contempt of court in failing and neglecting to answer said bill as aforesaid. And thereupon the following attachment issued, viz.:

The United States of America, District of Ohio, set.—To the Marshal of said district, greeting:

We command you to attach Samuel Sullivan, so that you have his body before the Judges of the Circuit Court of the United States for the Seventh Circuit and District of Ohio aforesaid, at Columbus, on Thursday, the fourth day of the present term of January, to answer us, as well of a certain contempt by him against us committed, as it is said, as what shall be then and there alleged against him, and fur-
ther to do and receive whatever our said court shall think
page 45 proper in this behalf. And this you shall in nowise omit. And have then there this writ.

Witness the Honorable John Marshall, Chief Justice of the United States, this third day of January, in the year of our Lord one thousand eight hundred and twenty-one, and in the forty-fifth year of the independence of the United States of America.

Att.: HARVEY D. EVANS, Clk.

Endorsement.

For failing and neglecting to answer an original bill, amended bill, and supplemental bill in the said court, exhibited against him and others by The President, Directors, and Company of the Bank of the

United States, although duly served with a subpœna requiring him to answer it, and altho' ruled so to do.

By order of the court.

HARVEY D. EVANS, Clk.

Marshal's Return.

I have the body. JNO. HAMM, Marshal.

And afterwards, to wit: on Thursday, the fourth day of
page 46 January, in the year last aforesaid, being the day to which said writ was made returnable, "the defendant, Samuel Sullivan, against whom the attachment issued in this cause, was this day brought into court in custody of the marshal, and thereupon, having filed his answer in this cause, was discharged from further custody on said attachment."

Which said answer is in the words and figures following, to wit:

To the honorable the Judges of the United States Circuit Court for the Seventh Circuit and District of Ohio, in chancery now sitting:

The separate answer of Samuel Sullivan, who is sued as Treasurer of the State of Ohio and in his individual character, to the bill of complaint of The President, Directors, and Company of the Bank of the United States in this court, exhibited against him and others.

This respondent, saving and reserving to himself all man-
page 47 ner of benefit of exception to the many errors and insufficiences in the said bill contained, for answer to so much thereof as he is advised it is material for him to answer unto, he answers and says, that as to the matters alleged and charged in the complainant's original bill of complaint, this respondent of his own knowledge knows nothing, neither has this respondent any individual or personal knowledge of the levying and collecting and paying over the sum of $100,000 *dollars* as a tax from the Bank of the United States.

This respondent was appointed Treasurer of the State of Ohio, in the place of Hiram M. Curry, on the 17th day of February, 1820, and upon the 23rd of that month entered the treasury and commenced examining the *the* funds. Among the funds found in the treasury was the sum of 98,000 dollars, which this respondent understood was the same as charged in the bill, but this he does not know of his own
knowledge. On the 4th of March, 1820, the funds having
page 48 been counted and the amount ascertained, this respondent executed a receipt for the same, an official copy of which is herewith filed, marked A, which this respondent prays may be considered part of this answer, since which time the funds aforesaid have remained in the hands of this respondent as Treasurer of the State of Ohio, and in no other character. And the said sum of 98,000 doll's has

remained untouched in respect for an injunction prohibiting the disposing thereof, said to have been allowed by this court upon a bill since dismissed. This respondent admits that this sum consisted in part of the sum in specie described in the complainant's bill, and also of the sum of 8,000 doll's in notes of 20 dollars each, numbered, lettered, and payable as is in said bill described, and the residue consisted of notes of the Bank of the United States, numbered, lettered, made payable, and of the amount specified in a schedule to this answer
page 49 annexed, marked B, which this respondent prays may be taken as part of this answer—all of which specie and notes are now in the State treasury, and only in the possession of this respondent as Treasurer of State. This respondent has no individual interest in the said monies, and in his individual character paid no consideration for them. This respondent admits that he had notice from general report and from the information of the late Treasurer that the said sum of 98,000 was levied as a tax upon the Bank of the United States and collected from them, and that the bank alleged such collection to be illegal and violent.

This respondent, having answered the complainant's prayer for discovery, denies all fraud, violence, and unlawful combination, and prays to be hence dismissed with his reasonable costs and charges, &c.

C. HAMMOND, for defen't.

The defendant, S. Sullivan, affirms that the matters
page 50 in the above answer stated are true to the best of his knowledge and belief.

Affirmed before me this 4th day of Jan'y, 1821.

ELI C. KING, Justice Peace. [Seal.]

EXHIBIT A.

Received, March 4th, 1820, of Hiram M. Curry, Esq., late Treasurer of the State of Ohio, one hundred and fifty-two thousand nine hundred and fifty-seven dollars forty-two cents and five mills, on account of the general revenue of the State, in money, bank notes, checks, deposits, and notes of hand for authorized loans, being part of the funds this day delivered to me as per the schedule of funds this day signed by us both in presence of William Neil and Amasa Vanhorne.

$152,957 42.5.

(Signed) SAMUEL SULLIVAN,
in my office. Treasurer.

I certify the foregoing to be a true copy of the original on file January 4, 1820.

RALPH OSBORN,
Auditor of the State of Ohio.

[page 51]

EXHIBIT B.

Nos.	Letter.	Date.	Office of Discount and Deposit.	Num. Dolls.	Amount.
106	E and F.	Oct. 6, 1817.	Chillicothe.	$100	$ 200 00
102	H and G.	do	do	do	200 00
103	E, F, and H.	"	"	"	300 00
104	E, F, G.	"	"	"	300 00
115	E, F, G, H.	"	"	"	400 00
101	H, G.	"	"	"	200 00
122	E, F, G, H.	"	"	"	400 00
128	E, F, G, H.	"	"	"	400 00
114	E, F, G, H.	"	"	"	400 00
116	Same.	"	"	"	400 00
105	Same.	"	"	"	400 00
113	do	"	"	"	400 00
119	"	"	"	"	400 00
120	"	"	"	"	400 00
121	"	"	"	"	400 00
117	"	"	"	"	400 00
118	"	"	"	"	400 00
125	"	"	"	"	400 00
126	"	"	"	"	400 00
127	"	"	"	"	400 00
123	"	"	"	"	400 00
124	"	"	"	"	400 00
129	"	"	"	"	400 00
131	"	"	"	"	400 00
130	"	"	"	"	400 00
132	"	"	"	"	400 00
133	"	"	"	"	400 00
		[page 52]			$10,000 00
N 24	E, F, G, H.	Oct. 6, 1817.	Chillicothe.	$100	400 00
37	Same.	Same.	Same.	Same.	400 00
74	"	"	"	"	400 00
66	"	"	"	"	400 00
23	"	"	"	"	400 00
38	"	"	"	"	400 00
73	"	"	"	"	400 00
28	"	"	"	"	400 00
33	"	"	"	"	400 00
48	"	"	"	"	400 00
12	"	"	"	"	400 00
29	"	"	"	"	400 00

Exhibit B—Continued.

Nos.	Letter.	Date.	Office of Discount and Deposit.	Num. Dolls.	Amount.
32	Same.	Same.	Same.	Same.	$ 400 00
45	"	"	"	"	400 00
31	"	"	"	"	400 00
94	"	"	"	"	400 00
83	"	"	"	"	400 00
17	"	"	"	"	400 00
16	"	"	"	"	400 00
39	"	"	"	"	400 00
30	"	"	"	"	400 00
72	"	"	"	"	400 00
9	"	"	"	"	400 00
13	"	"	"	"	400 00
8	"	"	"	"	400 00
		[page 53]			
10	"	"	"	"	400 00
11	"	"	"	"	400 00
14	E and F.	"	"	"	200 00
80	F, G, H.	"	"	"	300 00
1	F, H.	"	"	"	200 00
77	G, H.	"	"	"	200 00
64	F, H.	"	"	"	200 00
7	H, F, G.	"	"	"	300 00
2	G, F.	"	"	"	200 00
					$12,400 00
90	F, G, H.	"	"	"	300 00
89	E, F, H.	"	"	"	300 00
87	E, F, G.	"	"	"	300 00
25	E, F.	"	"	"	200 00
81	E, F, G, H.	"	"	"	400 00
58	E, G. H.	"	"	"	300 00
46	E, F, G.	"	"	"	300 00
67	E, G, H.	"	"	"	300 00
85	H, F.	"	"	"	200 00
44	F, G.	"	"	"	200 00
86	H, F.	"	"	"	200 00
82	F, G, H.	"	"	"	300 00
34	E, H.	"	"	"	200 00
5	E.	"	"	"	100 00
112	E.	"	"	"	100 00
27	E, F, G.	"	"	"	300 00
84	F, G, H.	"	"	"	300 00
56	F, G, H.	"	"	"	300 00

[page 54]

Exhibit B—Continued.

Nos.	Letter.	Date.	Office of Discount and Deposit.	Num. Dolls.	Amount.
65	F, G, H.	Same.	Same.	Same.	$ 300 00
68	E, G, H.	"	"	"	300 00
55	F, H.	"	"	"	200 00
85	G, E.	"	"	"	200 00
86	G and F.	"	"	"	200 00
47	E, G, and H.	"	"	"	300 00
98	E, G, and F.	"	"	"	300 00
92	F.	"	"	"	100 00
36	E.	"	"	"	100 00
22	H.	"	"	"	100 00
75	E.	"	"	"	100 00
57	E.	"	"	"	100 00
195	G.	"	"	"	100 00
91	E.	"	"	"	100 00
					$ 7,100 00
N 851	E.	1 Feb'y, 1817.	Washington.	$100	100 00
49	F.	6 Oct., 1817.	Chillicothe.	100	100 00
70	E.	do	do	do	100 00
69	F.	do	do	"	100 00
35	H.	"	"	"	100 00
26	G.	"	"	"	100 00
95	F.	"	"	"	100 00
110	F.	"	"	"	100 00
97	F.	"	"	"	100 00
78	E.	"	"	"	100 00
54	H.	"	"	"	100 00
		[page 55]			
					$ 1,100 00
119	A.	6 Oct., 1817.	Chillicothe.	$50	50 00
144	A.	Same.	Same.	Same.	50 00
118	B, C, D.	"	"	"	150 00
143	C, D.	"	"	"	100 00
150	A, B, C, and D	"	"	"	200 00
149	A, B, C, and D	"	"	"	200 00
136	A, B, C, and D	"	"	"	200 00
127	Same.	"	"	"	200 00
134	"	"	"	"	200 00
133	"	"	"	"	200 00
132	"	"	"	"	200 00
180	"	"	"	"	200 00

Exhibit B—Continued.

Nos.	Letter.	Date.	Office of Discount and Deposit.	Num. Dolls.	Amount.
139	Same.	Same.	Same.	Same.	$ 200 00
138	"	"	"	"	200 00
109	"	"	"	"	200 00
168	"	"	"	"	200 00
173	"	"	"	"	200 00
142	"	"	"	"	200 00
122	"	"	"	"	200 00
121	"	"	"	"	200 00
					$ 3,550 00
N 175	A, B, C, and D	6 Oct., 1817.	Chillicothe.	$50	200 00
141	Same.	Same.	Same.	Same.	200 00
123	Same.	Same.	Same.	Same.	200 00
124	"	"	"	"	200 00
126	"	"	"	"	200 00
125	"	"	"	"	200 00
115	"	"	"	"	200 00
		[page 56]			
114	"	"	"	"	200 00
113	"	"	"	"	200 00
129	"	"	"	"	200 00
120	"	"	"	"	200 00
174	"	"	"	"	200 00
182	"	"	"	"	200 00
128	"	"	"	"	200 00
176	"	"	"	"	200 00
177	"	"	"	"	200 00
178	"	"	"	"	200 00
179	"	"	"	"	200 00
181	"	"	"	"	200 00
153	"	"	"	"	200 00
163	"	"	"	"	200 00
161	"	"	"	"	200 00
162	"	"	"	"	200 00
164	"	"	"	"	200 00
165	"	"	"	"	200 00
166	"	"	"	"	200 00
167	"	"	"	"	200 00
154	"	"	"	"	200 00
155	"	"	"	"	200 00
156	"	"	"	"	200 00
158	"	"	"	"	200 00
157	"	"	"	"	200 00

Exhibit B—Continued.

Nos.	Letter.	Date.	Office of Discount and Deposit.	Num. Dolls.	Amount.
195	Same.	Same.	Same.	Same.	$ 200 00
		[page 57]			
					$ 6,600 00
N 159	A, B, C, and D	Oct. 6, 1817.	Chillicothe.	$50	200 00
160	"	"	"	"	200 00
145	"	"	"	"	200 00
146	"	"	"	"	200 00
137	"	"	"	"	200 00
111	"	"	"	"	200 00
112	"	"	"	"	200 00
152	"	"	"	"	200 00
135	"	"	"	"	200 00
147	"	"	"	"	200 00
130	"	"	"	"	200 00
131	"	"	"	"	200 00
140	"	"	"	"	200 00
192	"	"	"	"	200 00
191	"	"	"	"	200 00
190	"	"	"	"	200 00
189	"	"	"	"	200 00
188	"	"	"	"	200 00
187	"	"	"	"	200 00
186	"	"	"	"	200 00
185	"	"	"	"	200 00
184	"	"	"	"	200 00
151	"	"	"	"	200 00
172	"	"	"	"	200 00
183	"	"	"	"	200 00
148	"	"	"	"	200 00
171	"	"	"	"	200 00
		[page 58]			
170	"	"	"	"	200 00
169	"	"	"	"	200 00
200	"	"	"	"	200 00
194	"	"	"	"	200 00
117	"	"	"	"	200 00
116	"	"	"	"	200 00
					$ 6,600 00
N 110	A, B, C, and D	6 Oct., 1817.	Chillicothe.	$50	200 00
199	Same.	Same.	Same.	Same.	200 00
198	"	"	"	"	200 00
197	"	"	"	"	200 00

Exhibit B—Continued.

Nos.	Letter.	Date.	Office of Discount and Deposit.	Num. Dolls.	Amount.
196	Same.	Same.	Same.	Same.	$ 200 00
195	"	"	"	"	200 00
108	"	"	"	"	200 00
102	"	"	"	"	200 00
101	"	"	"	"	200 00
107	"	"	"	"	200 00
106	"	"	"	"	200 00
103	"	"	"	"	200 00
104	"	"	"	"	200 00
105	"	"	"	"	200 00
2012	D.	1 Jan'y, 1817.	Philadelphia.	10 doll.	10 00
4567	C.	1 Jan'y, 1817.	Philadelphia.	10	10 00
					$ 2,820 00
43	F, G, E.	6 Oct., 1817.	Chillicothe.	100	300 00
96	E, F, G.	"	"	"	300 00
		[page 59]			
95	E, F, H.	"	"	"	300 00
93	E, G, H.	"	"	"	300 00
78	F, G, H.	"	"	"	300 00
100	E, F, G.	"	"	"	300 00
186	E, F.	"	"	"	200 00
190	E, F.	"	"	"	200 00
53	E, F.	"	"	"	200 00
34	G, F.	"	"	"	200 00
92	H, G.	"	"	"	200 00
89	G.	"	"	"	100 00
4	H.	"	"	"	100 00
95	H.	"	"	"	100 00
49	H.	"	"	"	100 00
80	E.	"	"	"	100 00
199	H.	"	"	"	100 00
84	E.	"	"	"	100 00
27	H.	"	"	"	100 00
82	E.	"	"	"	100 00
93	F.	"	"	"	100 00
98	H.	"	"	"	100 00
99	G.	"	"	"	100 00
75	G.	"	"	"	100 00
70	H.	"	"	"	100 00
1	G and E.	"	"	"	200 00

[Page 60.]

Numbers 59, 52, 60, 61, 193, 42, 184, 185, 62, 63, 194, 71, 51, 50, E, F, G, and H, of 100 dollars each, dated and payable as above, - - - - - - - - -	5,600 00
	10,000 00
Notes dated and payable as above for 100 dollars each, numbers 34 to 58 inclusive, letters E, F, G, H, - -	10,000 00

And thereupon came the complainants by their counsel, and filed their replication to the answer aforesaid, which is in the words following, to wit:

The replication of The President, Directors, and Company of the Bank of the United States, complainants, to the answer of Samuel Sullivan, as Treasurer of the State of Ohio and in his individual capacity, defendant.

These replicants, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereto, say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defend-
page 61 ant; and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these repliants, without that *that* any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true—all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

And further proceedings were continued.

And now at this day, to wit: on the day, in the year, and at the place first herein aforesaid mentioned, this cause came on to be heard on the bill and amendatory bill, answer of the defendants Curry and Sullivan, and exhibits; and as to the other defendants, Osborn and Harper, the court doth, upon motion of the complainants
page 62 by their counsel, take the bill and amendatory bill for confessed; whereupon, and after hearing the arguments of counsel, the court doth adjudge, order, and decree that the defendants, or some one of them, do pay over and deliver to the complainants the sum of one hundred thousand dollars, sixteen thousand dollars, part thereof, in specie, current by law in the U. States, other than American gold coin, three thousand eight hundred and thirty dollars, other

part thereof, in American gold coin, and eighty thousand one hundred and seventy dollars, the residue of the said sum of one hundred thousand dollars, in notes of the complainants, payable at their bank in Philadelphia, and at their office of discount and deposit at Chillicothe, being the same which were seized and taken from the complainants as in the amendatory bill and proceedings mentioned, with interest upon the said two sums of sixteen thousand and
page 63 three thousand eight hundred and thirty dollars, amounting together to nineteen thousand eight hundred and thirty dollars, after the rate of six per cent. per annum from the 17th day of September, 1819, until paid.

And it is further decreed and ordered that the said defendants do, on or before the 6th day of the present month of September, 1821, pay over and deliver to the complainants the aforesaid sum of one hundred thousand dollars in the proportions above mentioned, with interest as aforesaid. And for the purpose of *re*receiving the said principal, sum, and interest, upon motion of the complainants, William Creighton, Jr., president of the office of discount and deposit at Chillicothe, is appointed by them and is received as their agent, payment to *to* whom, by the defendants, will exonerate them from that part of this decree.

And it is further adjudged, ordered, and decreed that the
page 64 defendants, and each of them, be perpetually enjoined from proceeding to collect any tax which has accrued or may hereafter accrue from the complainants under the act of the General Assembly of Ohio in the bill and proceedings mentioned.

And it is finally decreed and ordered that the defendants do pay to the complainants the costs expended by them in prosecuting this suit.

Upon motion of the complainants, and for the purpose of carrying the same into effect, it is ordered that they have leave immediately to take out an official copy of the decree pronounced in this cause.

And thereupon the following certified copy of said decree issued, viz.:

U. States 7th Circuit Court, Ohio District.

The President, Directors, and Company of the Bank of the United States, compl'ts,
against
Ralph Osborn, Hiram Curry, John S. Harper, and Samuel Sullivan, def'ts.

September term, 1821—Wednesday, 5th—In chancery.
page 65

This cause this day came on to be heard on the bill and amendatory bill, answers of defendants Curry and Sullivan, and exhibits; and as to the other defendants, Osborn and Harper, the court doth, upon motion of the complainants by their counsel, take the bill and amendatory bill for confessed; whereupon, and after hearing the arguments

of counsel, the court doth adjudge, order, and decree that the defendants, or some of them, do pay over and deliver to the complainants the sum of one hundred thousand dollars, sixteen thousand dollars, part thereof, in specie, current by law in the United States other than American gold coin, three thousand eight hundred and thirty dollars, other part thereof, in American gold coin, and eighty thousand one hundred and seventy dollars, the residue of the said sum of one hundred thousand dollars, in notes of the complainants,
page 66 payable at their bank in Philadelphia, and at their office of discount and deposit at Chillicothe, being the same which were seized and taken from the complainants, as in the amendatory bill and proceedings mentioned, with interest upon the said two sums of sixteen thousand and three thousand eight hundred and thirty dollars, amounting together to nineteen thousand eight hundred and thirty dollars, after the rate of six per cent. per annum from the 17th day of September, 1819, until paid.

And it is further decreed and ordered that the said defendants do, on or before the sixth day of the present month of September, 1821, pay over and deliver to the complainants the aforesaid sum of one hundred thousand dollars in the proportions above mentioned, with interest as aforesaid. And for the purpose of receiving the said principal sum and interest, upon motion of the complainants,
page 67 William Creighton, Jr., president of the office of discount and deposit at Chillicothe, is appointed by them and is received as their agent, payment to whom by the defendants will exonerate them from that part of this decree.

And it is further adjudged, ordered, and decreed that the defendants, and each of them, be perpetually enjoined from proceeding to collect any tax which has accrued or may hereafter accrue from the complainants, under the act of the General Assembly of Ohio, in the bill and proceedings mentioned.

And it is finally decreed and ordered that the defendants do pay to the complainants the costs expended by them in prosecuting this suit.

Att.: HARVEY D. EVANS, Clk.

I, Harvey D. Evans, clerk of the Seventh Circuit Court of the United States in and for the District of Ohio, do certify the foregoing to be a true copy from the records of said court.

page 68 In testimony of which I have hereunto subscribed my name and affixed the seal of *of* said court at Columbus this
[Seal.] 5th day of September, 1821.

HARVEY D. EVANS, Clk.

William Creighton, Jr., the agent named in the within decree, personally appeared in open court, and being first duly sworn, deposeth and saith that he called on Samuel Sullivan, one of the defendants named in the within decree, this day at ten o'clock and handed the

same to said Sullivan, who, after carefully reading the same, this deponent demanded a performance of the decree, to which he replied that he could not comply with the decree.

WM. CREIGHTON, Jr.,
HARVEY D. EVANS, Clk.

Sept. 6, 1821, sworn and subscribed before me.

And afterwards, to wit: on the sixth day of September, in the year one thousand eight hundred and twenty-one, on motion of the complainants, ordered that the defendants Sullivan and Osborn
page 69 show cause to-morrow why an attachment shall not issue against them for a contempt committed by them in not performing the decree of this court pronounced in this cause on yesterday.

And afterwards, to wit: on Friday, the seventh day of September, in the year last aforesaid, upon a rule to show cause why an attachment should not issue against the defendants Osborn and Sullivan for a contempt of court in not performing the decree of this court, pronounced in this cause on the fifth instant, this day appeared by counsel and showed cause as follows, to wit: President, Directors, and Company of the Bank of the U. S. *vs.* Ralph Osborn and Samuel Sullivan. Upon a rule upon Ralph Osborn to show cause why an attachment shall not be issued against him for a contempt of court in not performing the decree pronounced in this cause against him at this term.

page 70 The said Ralph Osborn shows for cause, and upon oath says, that no part of the sum of money in the decree mentioned ever came to his hands; that 98,000 dollars, part thereof, was by an order of injunction made by this court, at their September term, 1820, staid in the treasury, in the hands of Samuel Sullivan, Treasurer of State, where the same, as this affiant believes, now remains; that the said sum of money is out of the power or control, and beyond the reach of this affiant in his individual capacity, and in his official capacity this affiant can only draw orders upon the treasury where appropriations are made by law, and no appropriation exists under which this affiant can draw or order for the said sum of money in the decree mentioned, which said sum of money this affiant respectfully suggests is placed beyond his official control by the aforesaid order of injunction made by this
page 71 court. This respondent refused to perform said decree because it is wholly impossible for him to perform it, and not from any disrespect or contempt of the authority of the United States or this court.

Sworn to and subscribed before me this 7th day of September, 1821.

RALPH OSBORN.

ELI C. KING,
Justice of the Peace. [Seal.]

President, Directors, and Co. of the Bank of the U. S. vs. Ralph Osborn, Samuel Sullivan, and others, upon a rule upon Samuel Sullivan to show cause why an attachment shall not be issued against him for a contempt in not performing the decree pronounced in this cause against him at this term.

The said Samuel Sullivan, for cause shows and upon oath says, that of the sum of money in the decree specified only 98,000 dollars ever came to his hands; that this sum of 98,000 dollars was paid to him as Treasurer of the State of Ohio by his predecessor in
page 72 office; that he received it as revenue of the State of Ohio, and gave his receipt for it as such; that he has no individual interest in or control over the said sum of money; that by the laws of the State of Ohio prescribing his official duty he can pay no money out of the treasury received as revenue of the State, except upon the order of the Auditor of the State; and that by the Constitution of the State and by the law regulating the duties of Auditor and Treasurer the Auditor can draw no bill nor can the Treasurer pay out money, except where appropriations are made by law; that this affiant hath taken an oath of office binding him to perform the duties appertaining to the office, and hath given bond with the security conditioned to the same effect. And this affiant conscientiously conceives that he cannot obey the said decree without a violation of official duty in paying money out of the treasury without an order
page 73 from the Auditor of State, and without an appropriation made by law, which violation of duty, this affiant conceives, may involve him in the commission of perjury, and may amount to a forfeiture of his bond; that these considerations alone induced him not to comply with the decree of this court, and his refusal so to comply was in no respect in contempt of the authority of the United States or of this court.

SAMUEL SULLIVAN.

Affirmed and subscribed to before me this 7th day of September, 1821.

ELI C. KING,
Justice of the Peace. [Seal.]

On motion of the complainants, and the court having fully heard the arguments of counsel, it is ordered that said rule be made absolute as to Sullivan, and that an attachment issue accordingly, returnable to-morrow; and as to Osborn, continued until next
page 74 term.

And thereupon the following attachment issued, to wit:

The United States of America, District of Ohio, set.—To the Marshal of said District, greeting:

We command you to attach Samuel Sullivan, so that you have his body before the Judges of the Circuit Court of the United States for

the Seventh Circuit and District of Ohio aforesaid, at Columbus, on Saturday, the eighth day of the present month of Septemher, to answer us as well of a certain contempt by him against us committed as what shall be then and there alle*d*ged against him, and further to do and receive whatever our said court shall think proper in this behalf. And this you shall in nowise omit. And have then there this writ.

[Seal.] Witness the Honorable John Marshall, Chief Justice of the United States, this seventh day of September, 1821, and in the 46th year of the independence of the United States of America.

page 75

Att.: HARVEY D. EVANS, Clk.

Endorsement.

For a contempt committed by the within-named Samuel Sullivan in not performing the decree of this court, pronounced in this cause on the 5th inst.

By order of the court.

HARVEY D. EVANS, Clk.

Marshal's Return.

I have the body.

J. VICKERS, Dep'ty Marshal.

And afterwards, to wit: on the eighth day of September, in the year last aforesaid, the attachment sued out against the defendant, upon the motion of the Bank of the United States, to bring him into court to answer for a contempt in neglecting and refusing to perform the decree of this court, pronounced during the present term in the suit in chancery in the name of The President, Directors, and Company of the Bank of the United States against Ralph Osborn, John S. Harper, Hiram M. Curry, and the defendant, was this day

page 76 returned executed by the marshal, and the body of the defendant brought into court according to the command of the said attachment.

And the defendant, having admitted his refusal to perform the said decree, in his written affidavit filed on the rule to show cause why the attachment should not issue, it is ordered by the court that he be committed and stand committed until he performs the said decree, and he is remanded to the custody of the marshal for the due execution of this order.

And it is further adjudged and ordered that he pay the costs of this attachment, including the rule to show cause and the subsequent proceedings thereon.

And afterwards, to wit: on the tenth day of September, in the year last aforesaid, on motion of the complainants by their counsel, and upon their exhibition to the court of due proof that the defendant

Sullivan still refuses to perform the decree of this court
page 77 pronounced in this cause, it is ordered that a writ of sequestration be issued forthwith to the complainants to sequester the real and personal estate of the said defendant, and the identical sum of one hundred thousand dollars in the said decree mentioned and described, until the said defendant discharges himself of the contempt for which he is now in confinement, and until the further order of the court; and on motion of the complainants, William Creighton, Jr., Isaac Cook, Harry Brush, and William Key Bond are nominated as commissioners to execute the said writ of sequestration, which it is ordered shall be in the following form:

The United States of America, District of Ohio, set.—To William Creighton, Jr., Isaac Cook, Harry Brush, and William Key Bond, Esq'rs, greeting:

Whereas The President, Directors, and Company of the Bank of the United States, complainants, exhibited their bill of com-
page 78 plaint into the Circuit Court of the United States for the District of Ohio against Ralph Osborn, John S. Harper, Hiram M. Curry, and Samuel Sullivan, defendants, on which bill such proceedings were had that, on the 5th day of September, 1821, a decree was pronounced by the said court against the said defendants, requiring them to pay over and deliver to the complainants, on or before the sixth day of September, 1821, the sum of one hundred thousand dollars, sixteen thousand dollars, part thereof, in specie current by law in the United States, other than American gold coin, three thousand eight hundred and thirty dollars, other part thereof, in American gold coin, and eighty thousand one hundred and seventy dollars, the residue of the said sum of one hundred thousand dollars, in notes of the complainants, payable at their bank in Philadelphia, and at their office of discount and deposit at Chillicothe,
page 79 being the same that was forcibly taken from the complainants as a tax imposed by an act of the General Assembly of Ohio upon their two offices of discount and deposit situated within the aforesaid district. And whereas the said Samuel Sullivan having refused to comply with the said decree, upon being served with a copy thereof, the said court, after hearing all that the said Sullivan offered in justification of his contumacy, hath committed him to the custody of the marshal of the said district, in which he now remains for his said contempt. And whereas the said Sullivan still refuses to perform the aforesaid decree of the court, know ye, therefore, that in confidence of your prudence and fidelity we have given, and by these presents do give to you or any three of you, full power and authority to enter upon all the messuages, lands and tenements, and real estate whatsoever of the said Samuel Sullivan, and to take,
page 80 collect, receive, and sequester into your hands not only all the rents and profits of the said messuages, land, and real estate, but also all his goods and chattels and personal estate, and par-

ticularly the identical one hundred thousand dollars for which the said decree was pronounced, or any part thereof, wherever the same may be found under the control or in the possession of the said Sullivan; and therefore we command you, or any three of you, that you do at proper and convenient days and hours go to and enter upon all the messuages, lands, tenements, and real estate of the said defendant Sullivan, and that you do collect, take, and get into your hands not only the rents of all his said real estates, but also his goods, chattels, and personal estate, and particularly the identical one hundred thousand dollars aforesaid, or such part thereof as you can find, and keep the same under sequestration in your hands until the said Sul-
page 81 livan shall fully clear his aforesaid contempt and the said court make other order to the contrary, and how you shall execute this commission from time to time make known to the said Circuit Court.

Witness the Honorable John Marshall, Chief Justice of the United States of America, this 10th day of September, 1821, and in the 46th year of the independence of the United States of America.

Att.: HARVEY D. EVANS, Clk.

And thereupon the aforesaid writ issued in form aforesaid, and on which there is the following return:

In obedience to the within writ, the undersigned, appointed by the court for that purpose, have taken ninety-eight thousand dollars, part and parcel of the said one hundred thousand dollars in this writ mentioned, and they have the same, to be further disposed of as this hon-
orable court shall direct, and pray the order of the court
page 82 thereupon. And as to the sum of two thousand dollars, the balance of the said one hundred thousand dollars, they have not found the same, nor any messuages, lands, tenements or real estate, or any goods and chattels of the said defendant Sullivan to sequester, whereof to make the same, but understood there are such within the said District of Ohio, and ask advice of the court if they shall proceed further in the execution of said writ.

W. CREIGHTON, Jun.,
ISAAC COOK,
H. BRUSH,
WM. KEY BOND.

Sep. 10, 1821.

And afterwards, to wit: on the day and year last aforesaid, the defendants in this cause prayed an appeal to the Supreme Court of the United States from the decree pronounced against them on the 5th
instant, being the third day of this present term, which is
page 83 granted to them upon their giving bond, with Charles Hammond as security, in the sum of five thousand dollars, con-

ditioned as the law directs; it being agreed between the parties that this appeal shall operate as a supersedeas only as to two thousand dollars, part of the $100,000 decreed to be paid to the complainants, and as to the interest and costs decreed to be paid by the said decree, and thereupon on the bond with security is filed, as by this order is required.

And afterwards, to wit: on the same day and year last aforesaid, the commissioners appointed to execute the writ of sequestration awarded in this cause, having reported that they had, according to the command of the said writ, sequestered ninety-eight thousand dollars, part of the one hundred thousand dollars in the decree in this cause mentioned, on motion of the complainants, it is ordered that the said sum of ninety-eight thousand dollars be paid over

page 84 to them; and the defendants having prayed an appeal, which has been allowed them, as to the residue of the said decree, the defendant Sullivan, by the consent of the complainants, is discharged from custody; but this discharge is to be without prejudice to any measure which may be necessary to be pursued to enforce payment of the costs arising out of the proceedings consequent upon the said defendant's failure to perform the decree of this court, if any should be necessary. It is, on motion of the defendant Osborn, ordered that the rule against him to show cause why an attachment for contempt should not issue for his non-performance of the decree pronounced herein be discharged.

Exhibits—Sep. 1821.

It is agreed—

page 85 1st. That if the decree pronounced in the suit in ch'y of the B'k U. States ag't Osborn, &c., at the present term of the Federal c't of Ohio shall be affirmed by the Supreme C't, the action of trespass to be continued during the intermediate time is to be dismissed at the defendants' costs.

2nd. If it shall be reversed and the bill dismissed, the bank is then to be at liberty to prosecute the action of trespass, but is to contend only for the amount of that decree in damages.

3rd. In like manner, if the reversal be partial, the bank may prosecute, after such reversal, the action of tresspass for such sum — will, with the sum respecting which the decree may be affirmed, amount to as much as the decree is now pronounced for.

4th. No advantage is to be taken in the Supreme Court of the decree being against all the def'ts, instead of ap–ortioning principal an– interest between them, according to the respective *sums* and *times* of their receiving the amount levied.

page 86 5th. The attachment for contempt ag'st Osborn and Harper to be dismissed, at their costs, with the assent of the court.

6th. The decree to be enforced during the present term, except that the appeal (if the def'ts choose) may be made to operate on the

two thousand dollars, part of the $100,000 not now in the treasury, and the interests and costs.

H. CLAY, Counsel for the Bank.
C. HAMMOND, for Def'ts.

The President, Directors, and Co. of the Bank of the U. States,
vs.
Ralph Osborne et alias,
} In the Circuit Court of the United States.

Received of the commissioners named in the writ of sequestration in the above cause ninety-eight thousand dollars, the amount returned by the *the* commissioners.

W. CREIGHTON, Jun.,
Agent named in the decree.

Columbus, Sep. 10, 1821.

The United States of America, District of Ohio, set.:

page 87

I, Harvey D. Evans, clerk of the Seventh Circuit Court of the United States, within and for the District of Ohio aforesaid, do hereby certify that the foregoing contains a full, true, and complete transcript of the proceedings had in the aforesaid cause, as the same now remain of record in my office.

[Seal.] In testimony of which I have hereunto subscribed my name and affixed the seal of said court at Columbus, this 2d day of January, in the year of our Lord, 1822.

Att.: HARVEY D. EVANS, Clk.

Endorsed.

U. S. Circuit Court, Ohio District. 19. Bank of the United States vs. Ralph Osborn and others. Transcript filed January 24, 1822. Decided 1824.

page 88 Pleas held at the court-house in the town of Chillicothe, before the Honorable Thomas Todd and Charles W. Byrd, Judges of the Circuit Court of the United States for the Seventh Circuit in and for the District of Ohio, on Thursday, the sixth day of January, in the year of our Lord one thousand and eight hundred and twenty, and in the forty-fourth year of the American independence.

The President, Directors, and Company of the Bank of the United States, Compl'ts,
vs.
Ralph Osborn, Auditor of Ohio, Def't.
} In ch'y.

On motion, a rule is granted upon the said Ralph Osborn and John

S. Harper to shew cause why an attachment should not issue against them for a contempt of the said court for disregarding the process of injunction issued on the fourteenth, and also on the eighteenth day of September, in the year one thousand eight hundred and
page 89 nineteen, in the above cause depending before the court aforesaid, on the equity side thereof, and Tuesday next (it being the eleventh day of January, 1820,) is hereby given to the said Ralph Osborn and John S. Harper as a day in court to shew cause why the said rule should not be made absolute against them.

And afterwards, to wit: on Tuesday, the eighth day of the term aforesaid, upon a rule to shew cause why an attachment should not issue against the defendant, as also John S. Harper, for a contempt of court in disregarding the process of injunction issued against them on the fourteenth and also on the eighteenth day of September, 1819, this day appeared by their counsel and shewed cause as follows, to wit: Ralph Osborn, the defendant in this cause, in answer to the rule aforesaid given against him, upon oath says that he would attend and shew cause against said rule in person, but that the duties of his
page 90 said office as Auditor of the State of Ohio renders it extremely improper for him to leave his public duties at this time, it being the period appointed by law for the non-resident collectors of taxes to make their annual returns, and the settlement of their accounts being especially confided to the department of the government over which he is principal officer.

In further answer to said rule, this affiant says that he herewith transmits the original papers served on him by James McDougal on the morning of the fifteenth of September, 1819; that the said papers in his own judgment did not amount to an injunction; that the duty imposed on him by the law of the State, in regard to charging and collecting the tax in the proceedings mentioned, was in his opinion imperative, and while he wished to discharge the duties of his station according to law, he was particularly solicitous not to act
page 91 in any manner in contempt of the court; that considering himself that he could not alledge as an excuse (for the non-performance of his duty upon the day appointed by law) that he was stayed by an injunction, he proceeded to perform the official duties required of him by the law of the State. But at the same time, not wishing in such an important matter to rely upon his own judgment, he enclosed all the papers upon the subject in his possession to the Secretary of State, then at Chillicothe, with directions to submit the same to respectable counsel for advice, and either retain them or deliver the warrant to collect the tax, as counsel should advise; that he has understood and believes that said papers were submitted to P. Doddrige, Esqr., and Messrs. King and Atkinson, who gave it as their opinion that affiant was not staid in the execution of his official duty by any injunction, and in conformity to such advice the
page 92 warrant to collect the tax was delivered to John S. Harper.

This affiant states that he was only solicitous in said proceeding to perform his official duty, and without manifesting or offer-

ing any contempt to the Federal court, and that had process of injunction been duly served upon him before the fifteenth of September, or upon that day before he had acted, he would have obeyed the same. And in regard to the injunction of the eighteenth of September, also served by the said James McDougal, this affiant says that according to the interpretation of the law of the State of Ohio he then and now conceives that at the time of issuing said injunction the subject-matter was beyond his control, and that in fact and in truth he had no physical power to detain the money collected. And this affiant further saith, that although the injunction of the eighteenth of September forbade him either to pay over the
page 93 money collected or make report thereof in his general report of taxes to the Legislature, neither of which matters were included in the order of injunction made by the court on the fourteenth of September, yet in regard to the first this affiant could exercise no authority; and in regard to the second, this affiant, in respect to said writ, made the matter the subject of a special report to the General Assembly, instead of including the same in his general report of taxes.

This affiant further expressly states, that in all said proceedings he acted with a scrupulous respect for the Circuit Court, and would not and did not knowingly disregard any of its orders or injunctions touching the matter aforesaid.

RALPH OSBORN.

Personally appeared before Frederick Grimpke, President Judge of the Sixth Judicial District, Ralph Osborn, who being duly sworn, deposes and says that the matters and things contained in the above affidavit are true to the best of his knowledge and belief.
page 94

FREDERICK GRIMKE.

Sworn to before me this 10th day of January, 1820.

FREDERICK GRIMKE.

The State of Ohio, set.—To all whom it may concern:

Be it known that Frederick Grimke, Esq'r., who takes and subscribes the foregoing affidavit, now is the President Judge of the Sixth Judicial Circuit of the Courts of Common Pleas in the State of Ohio, duly appointed and commissioned as such, and that full faith and credit is and of right ought to be given to all his official doings and transactions, both in court and country.

In testimony whereof I, Ethan Allen Brown, Governor of
[Seal.] the said State of Ohio, have hereunto subscribed my name and caused the great seal of the State to be affixed the 10th

day of January, in the year 1820, and in the forty-fourth year of American independence.

page 95 ETHAN A. BROWN.

By the Governor:

JERE MCLINE, Secretary of State.

John S. Harper, in answer to the rule given against him for a contempt of court in disregarding the injunction issued on the 15th and on the 18th of September last, says that he was no party to said bill, and that when the warrant from the Auditor was delivered to him to be executed he understood that the same was delivered upon and in pursuance of the advice of counsel; that there was no injunction against issuing and executing said warrant; that when the injunction of the 18th was read to this affiant he had collected the money under the warrant, and was bound by an official bond and oath to pay the same into the State treasury, and was on his road to Columbus to make such payment; that he then and still supposed that he was not a party to said injunction, or bound to obey the same; that this affiant in all his actings and doings in the matter aforesaid acted in an official character, and did not mean to act in disregard or contempt of this court, nor would this affiant knowingly have disregarded the orders or injunctions of this court.

page 96

JOHN S. HARPER.

Sworn to in open court, Jan'y 11, 1820.

Att.: HARVEY D. EVANS, Clerk.

And by consent this rule is continued until to-morrow for argument.

And afterwards, to wit: on Thursday, the ninth day of the term aforesaid, upon a rule to show cause why an attachment should not issue against defendant, as also against John S. Harper, for a contempt of court, &c., the rule in this cause is continued under advisement until the next term of this court.

And afterwards, to wit: at September term, in the year last aforesaid, to wit, on Friday, the fifth day of said term—

[page 97]

The President, Directors, and Company of the Bank of the United States,	Compl'ts,	On motion for an attachment in chancery.
vs.		
Ralph Osborn, Auditor of Ohio,	Def't.	

Mr. Clay this day moved the court to receive in this cause two additional affidavits, to wit: an affidavit of William Creighton, Jun'r, and an affidavit of Abraham G. Claypoole, both sworn to in open court on yesterday morning; which motion was overruled.

And afterwards, to wit: on Saturday, the sixth day of the term aforesaid, upon a rule to shew cause why an attachment should not issue against said Ralph Osborn and John S. Harper for a contempt of said court in disregarding the process of injunction issued in the above cause, and the court having taken the same under advisement until this term, do, after mature deliberation thereon had, order and adjudge that the rule aforesaid given upon the said Ralph Osborn and John S. Harper at the last term of this court be made absolute,
page 98 and that an attachment issue accordingly, returnable to the first day of next term.

And afterwards, to wit: at January term, in the year of our Lord one thousand eight hundred and twenty-one, to wit: on Wednesday the third day of said term, on motion it is ordered that the attachment awarded in this cause at the last term of this court be issued against the said defendants, returnable to Friday next at ten o'clock A. M.; and thereupon an attachment was issued, which is in the words and figures following, to wit:

The United States of America, District of Ohio, set.—To the Marshal of said District, greeting:

We command you to attach Ralph Osborn and John S. Harper, so that you have their bodies before the Judges of the Circuit Court of the United States for the Seventh Circuit and District of Ohio aforesaid, at Columbus, on Friday next at ten o'clock, being the fifth day of the present term of January, to answer us as well
page 99 of a certain contempt by them against us committed as what shall be then and there alledged against them; and further, to do and receive whatever our said court shall think proper in this behalf. And this you shall in nowise omit. And have then there this writ.

Witness the Honorable John Marshall, Chief Justice of
[Seal.] the United States, this third day of January, one thousand eight hundred and twenty-one, and in the forty-fifth year of the independence of the United States of America.

Attest: HARVEY D. EVANS, Clerk.

Endorsement.

For disregarding the process of injunction issued on the fourteenth and eighteenth day of September, in the year eighteen hundred and nineteen, in the cause of The President, Directors, and Company of the Bank of the United States against Ralph Osborn, Auditor of Ohio, depending before the court aforesaid, on the equity
page 100 side thereof.

By order of the court.

HARVEY D. EVANS, Clerk.

And afterwards, to wit: on Thursday, the fourth day of the term aforesaid, the said defendants, against whom an attachment issued on yesterday, having this day appeared in court and surrendered themselves under the said attachment, severally entered into a recognizance in the sum of two thousand dollars each, conditioned for their appearance in this court from day to day during the present term, to answer such interrogatories as shall be propounded to them touching their said contempt, and to abide the further order and judgment of the court in the premises.

And afterwards, to wit: on Friday, the fifth day of the term last aforesaid, on motion of the defendants by their counsel, and for reasons appearing to the court, this cause is continued.

Whereupon the said defendants were severally recognized in the sum of two thousand dollars each, conditioned for their
page 101 appearance on the second day of the next term of this court, to answer the interrogatories this day filed, and such others as may be propounded to them touching their said contempt, and to abide the further order and judgment of the court in the premises.

And thereupon came the plaintiffs by their counsel and filed the following interrogatories, viz.:

U. States vs. Ralph Osborn, on Attachment for Contempt. Interrogatories to be propounded to the Defendant Osborn.

1st. When were you served with notice that an application would be made to the Circuit Court of the U. States at the instance of the Bank of the United States to enjoin and restrain you from proceeding to collect the tax imposed upon the offices of discount and deposit of the said bank established within the limits of the State of Ohio by the act of the Legislature of the said State, which passed on the 8th day of February, 1819?

page 102 2d. Did you employ or retain any counsel, and if any counsel, who, to oppose the said application?

3d. When and how did you first obtain notice that an injunction was granted by the said court according to the said application?

4th. On what day was the subpœna or summons which issued from the said court, with an injunction thereon endorsed, bearing date the 14th of September, 1819, served upon you? State the time of the service, and exhibit, if you have it, a copy of the subpœna or summons, with the endorsement of the injunction thereon, as the same were served upon you.

5th. Did you or did you not, on the 15th day of September, 1819, and before the service of any warrant of distress issued by you for the collection of the said tax, know that an injunction had been awarded by the said court to restrain you from collecting the said tax? How

did you obtain this knowledge, and did you or did you
page 103 not know it, both by the service of the injunction upon you and by other means, and if by other means, by what other means did you acquire the knowledge?

6th. When did you issue a warrant for the collection of the said tax, to whom did you direct it, and in what words was it issued?

7th. Have you the said warrant in your possession, and if you have not, what has become of it, and if you have it, exhibit it?

8th. Did you take any bond and security from the person appointed by you to collect the said tax, and if you did, when and where was the said bond executed?

9th. Did you or did you not know or believe, on the 15th September, 1819, that the Bank of the United States had given bond and security for the due prosecution of the injunction obtained by it to restrain you from collecting the said tax?

10th. When was the writ of injunction, which issued
page 104 from the said Circuit Court on the 18th day of September, 1819, in the said cause of the Bank of the United States against you, served upon you, or were you notified thereof?

11th. When was the warrant, if you issued a warrant for the collection of the said tax, returned to you, and was it returned before or after you were served with or notified of the said writ of injunction, bearing date the 18th day of September, 1819?

12th. How much was collected under the aforesaid warrant, issued by you for the collection of the said tax, and what disposition did you make?

SCOTT, BOND & CLAY,
for the Bank of the U. States.

United States vs. John S. Harper, on Attachment for Contempt.
Interrogatories to be propounded to the defendant.

1st. When, where, how often, and by whom were you
page 105 notified that an injunction had been obtained from the Circuit Court of the United States for the District of Ohio, by the Bank of the U. States against Ralph Osborn, Auditor of the State of Ohio, to restrain him from proceeding to collect the tax imposed by the Legislature of Ohio upon the offices of discount and deposit of the said bank, established within the limits of the said State, if you were notified?

2d. Did you or did you not, before you collected the said tax, know that such an injunction had been granted?

3rd. Were or were you not notified at the office of discount and deposit of the said bank, situated in Chillicothe, at the time when you proceeded to collect the said tax, and before you had collected the same, that such an injunction was granted?

4th. Did you or did you not say, when notified at the said office of

page 106 discount and deposit in Chillicothe, at the time when you proceeded to collect the said tax, and before you had collected the same, that you did not care whether the said injunction was granted or not, and that you would not regard it?

5th. If you did not say that you did not care whether the said injunction was granted or not, and that you would not regard it, what did you say?

6th. Had you any warrant, and if you had, in what words were it, to collect the said tax? Set forth and exhibit the warrant.

7th. When were you notified of the emanation of the writ of injunction, bearing date the 18th day of September, 1819, which issued on the suit of the Bank of the United States against Ralph Osborn, and were you notified thereof before or after you paid over the amount levied in virtue of the Auditor's warrant addressed to you?

page 107 8th. How much did you collect under the said warrant, of what species of money or bank notes did it consist, and to whom and when did you pay it over?

9th. When did you and where did you first receive from Ralph Osborn the warrant under which you collected the said tax?

10th. Did you give bond and security before or after you received the said warrant, and when did you execute the said bond?

SCOTT, BOND & CLAY,
for the Bank of the U. States.

And thereupon this cause was continued.

And afterwards, to wit: at September term, in the year last aforesaid, came the defendants aforesaid, Osborn and Harper, under the attachment for contempt, and filed their answers to the interrogatories, which are in the words and figures following, to wit:

United States vs. Ralph Osborn, upon attachment.

page 108 The answer of Ralph Osborn, to the interrogatories filed against him in this cause.

This affiant answers and says to the first interrogatory, that he was served with notice first alluded to in the first interrogatory on the eleventh day of September, 1819.

To the second interrogatory this affiant answers and says, that having received the aforesaid notice, he transmitted the same to Mr. Hammond (who, from conversation which previously passed between them, he considered as employed or willing to engage on the part of the State), and, if necessary, to resist the application; and that he did not employ him in any other manner. And further, he requested the opinion in writing of Messrs. Doddridge, King, and others, to whom he directed the papers to be shewn, whether he was enjoined or not. This he did for the purposes of informing himself through the

advice of – gentleman whom he supposed better acquainted with chancery practice than himself, and especially acquainted with
page 109 the practice of the United States Court, in which he had no practical experience, and with no view to elude or disobey the process or authority of the court. The affiant was never advised by them or Mr. Hammond to disobey an order or writ of injunction, and would not have done it knowingly. His views were, to be well assured of his duty before he should refuse to execute a law of the State made for his government.

3rd. To the third interrogatory this affiant answers and says that he does not recollect of receiving any notice that an injunction was allowed until the 18th of September, and then only in the manner stated in his former affidavit, to which he refers.

4th. In answer to the 4th interrogatory this affiant states that the subpœna or summons, with the endorsement thereon, alluded to in the 4th interrogatory, were served upon him on the 15th
page 110 of Sept., 1819, which are herewith exhibited. This service was made about sunrise, as well as he can recollect.

5th. In answer to the 5th interrogatory, this affiant states that he did not know that an injunction had been awarded by said court before issuing his warrant of the 15th of September aforesaid by any means whatever, but supposed, on the papers being served, that it had been refused; that the court would not allow an injunction before the Auditor of State attempted to act, and also that the endorsement made thereon was barely in conformity with the statute of the State which requires all writs to be endorsed "for what it is brought"; that he obtained the knowledge for the first time that an allowance of the injunction had been granted on the 18th September, by the service of the writ, dated that day. Whether he erred in his
page 111 judgment or in the conclusions he drew is for the honorable court to decide; but in his conscience he neither knew or believed that any order of injunction had been made when he issued the said warrant, and when he considered, did believe his authority executed and at an end in that respect.

6th. In answer to the sixth interrogatory, this affiant states that as Auditor of the State of Ohio he issued his warrant on the 15th day of September, 1819, directed to John S. Harper, in the words following:

The State of Ohio—To John S. Harper, greeting:

Whereas, in pursuance of the act of the General Assembly of the State of Ohio, passed on the 8th day of February, Anno Domini one thousand eight hundred and nineteen, entitled "an act to levy and collect a tax from all banks and individuals and companies and associations of individuals that may transact banking business in this State without being authorized to do so by the laws thereof," the Auditor
page 112 of State did proceed, upon the fifteenth day of September instant, to charge the Bank of the United States with a tax of fifty thousand dollars for the year one thousand eight hundred and nine-

teen, upon their office of discount and deposit established at Cincinnati, at which the said Bank of the United States have continued to transact banking business within the State after the first day of September instant; and whereas, also, the Auditor of State did proceed upon this fifteenth day of September instant to charge the Bank of the United States with a like tax of fifty thousand dollars for the year one thousand eight hundred and nineteen, upon their office of discount and deposit established at Chillicothe, at which the said Bank of the United States have also continued to transact banking business within this State after the first day of September instant, which two separate sums of fifty thousand dollars amount in the ag-
page 113 gregate to the sum of one hundred thousand dollars; and whereas I, Ralph Osborn, Auditor of State, conformably to the provisions of the act of the General Assembly above recited, have and by these presents do appoint you, John S. Harper, to execute this warrant for the collection of the sum of one hundred thousand dollars, above specified, from the Bank of the United States: these are, therefore, in the name of the State of Ohio, to command you, John S. Harper, that you collect from the Bank of the United States the sum of one hundred thousand dollars, above in this warrant specified, due from the said Bank of the United States to the State of Ohio for the tax aforesaid, in collecting which said sum of one hundred thousand dollars you shall proceed in the manner prescribed by the said act of the General Assembly of the State of Ohio, above recited,
page 114 and of your proceeding in the execution of this warrant you shall make return to the Auditor of State, at the Auditor's office, upon the first Monday of December next, and for your proceedings herein this shall be your sufficient warrant.

Given under my hand and seal of office, at the Auditor's
[Seal.] office in Columbus, this 15th day of September, Anno Domini one thousand eight hundred and nineteen, and of the independence of the United States the forty-fourth.

RALPH OSBORN,
Auditor of the State of Ohio.

Endorsement.

Bond given according to law.

RALPH OSBORN,
Auditor of the State of Ohio.

Levied the sum of one hundred thousand dollars within specified—$19,830 in specie and $80,170 in bank notes, on the office of D. & D. of the U. S. Bank in Chillicothe, and paid $98,000 thereof to the Treasurer of State, and retained two per cent. on the said amount, levied for my compensation.
page 115 JOHN S. HARPER.

Columbus, Ohio, Sep. 20, 1819.

7th. In answer to the seventh interrogatory, this affiant states that, as Auditor of the State of Ohio, he has in his possession the warrant, filed away in the Auditor's office, as other public documents are kept and filed. The warrant and return are here exhibited, and may be copied, to be here put on file.

8th. In answer to the eighth interrogatory this affiant states that he did take bond and security from the person appointed to collect the tax of $100,000 doll's. The bond was presented to him, fully executed, by the person appointed; he does not know where it was executed; he supposes it was executed at Chillicothe, some days before the reception thereof and before the date thereof.

9th. In answer to the ninth interrogatory this affiant states that he did not know, on the 15th of September, that the Bank of the U. States had given bond and security for the prosecution of
page 116 the injunction said to have been obtained to restrain him from collecting said tax; nor did he know that the endorsement on the back of the subpœna of bond and security, being given according to law, was for the prosecution of an injunction; nor did he believe it — be so.

10th. In answer to the tenth interrogatory this affiant states that the writ of injunction, which issued on the 18th, was served the night of the 18th about eight o'clock P. M., before which time he had no notice of it whatever, nor by any means to his recollection.

11th. In answer to the eleventh interrogatory this affiant states that the warrant aforesaid set forth was returned September 20, 1819, after the service of the writ of injunction issued on the 18th of September, 1819.

12th. In answer to the twelfth interrogatory this affiant states that he knows not how much was collected on the warrant,
page 117 except by endorsement and by hearsay, which appears to have been $100,000; that he did not make any disposition, directly or indirectly, of the money collected; the Treasurer's receipt for $98,000 doll's was deposited with him, for which he gave his receipt and charged the Treasurer with that amount, as in other cases of taxes paid to the Treasurer, the said Harper having retained $2,000 doll's as his percentage for collecting, as appears by the endorsement on said warrant and return.

RALPH OSBORN.

State of Ohio, Franklin co'y, ss.:

Personally appeared before me, the subscriber, a justice of the peace in and for the county of Franklin, R. Osborn, who, being duly sworn, deposith and saith that the foregoing is just and true.

Sworn and subscribed before me this 4th day of September, 1821.

ELI KING, Justice of the Peace. [Seal.]

page 118

The U. States vs. John S. Harper, upon attachment.

The answer of the said John S. Harper to the interrogatories propounded to him.

To the first interrogatory he on oath answers and says that until he was in the act of levying the Auditor's warrant, in the proceedings alluded to, he had heard nothing of the injunction in question, but that while in the act of executing the Auditor's warrant he was informed of that injunction, or that one was ordered. He thinks his information was from William Creighton, Jr., in the bank, after he had notified his intention to execute the warrant, and never before or otherwise.

This is his answer to the 2 and 3 interrogatory. Whether the matter stated was a legal notice or not this affiant leaves to the honorable court to decide; he did not himself consider it so, and did in his conscience believe he was not bound to notice it, as coming wholly from one of the parties and in no offi-
page 119 cial form; he had no other notice in fact, or otherwise, than as in this answer stated.

To the fourth interrogatory he answers that when he was told of an injunction in the bank, in the manner before stated, he has no precise recollection of what he did say, but he thinks he did say he would not regard it, or something to that effect; he at that time had no knowledge of the nature or office of an injunction, but having accepted the warrant and given his bond, he supposed he was bound to execute the warrant; and if in this opinion he erred, it was innocently and with no intention to evade the process or contemn the authority of the court. This is also his answer to the fifth interrogatory.

To the 6th interrogatory he answers that he had a warrant, that he executed and returned it, and that it is not now in his power, nor has he a copy of it, but he understands that the Auditor will produce it to the honorable court, and this affiant wishes it to be pro-
page 120 duced; he further states that he was notified of the writ of injunction stated in this interrogatory on the 18th September, when on his way with the money he had levied from Chillicothe to Columbus to make payment to the Treasurer of Ohio; he paid little attention to the notice, because he really thought he could not safely do so; and in this opinion, if he erred he did so innocently, and had no intention or even thought of holding in contempt or disrespect the authority or process of the court.

To the 8th interrogatory, he answers that he collected, in pursuance of his warrant, the sum of $100,000 doll's, to wit: in specie $19,830 doll's, and $80,170 doll's in bills of the mother bank, and her branch at Chillicothe, as nearly as he can now recollect, and paid $98,000 doll's over to the Treasurer.

To the 9th interrogatory he answers that he received the warrant from the Secretary of State at Chillicothe.

page 121 To the 10th he answers that he gave bond and security before he received the warrant; the bond was executed at Chillicothe some days before the 15th of September, and dated on

that day; he carried the bond to Columbus to present to the Auditor, if appointed to collect the tax; the appointment was made at Columbus on the 15 Sep., but he did not receive the warrant to execute until it was delivered to him at Chillicothe on the 16th Sept. by the Secretary of State.

And this affiant further states that, from the time of the delivery of the warrant to him, Ralph Osborn had nothing to do with the subject, as far as he knows or believes, until the money had been paid into the treasury and the warrant returned.

This affiant furthermore declares and says that if Mr. William Creighton, Jr., did read to him a subpœna of injunction in the bank at Chillicothe that circumstance has escaped his memory,
page 122 and that he recollects nothing of its being read.

JOHN S. HARPER.

The State of Ohio, Franklin county, set.:

Personally appeared before me, the subscriber, one of the justices of the peace in and for the county aforesaid, John S. Harper, who made solemn oath that the matters and things contained in the foregoing deposition are true.

Given under my hand and seal this 4th of September, 1821.

ELI C. KING, Justice Peace. [Seal.]

And by agreement of parties this cause is dismissed at defendants' costs.

It is therefore considered by the court that the United States recover of the defendants their costs and charges in this behalf expended.

Affidavit.

William Creighton, Jun'r, of lawful age, being first duly
page 123 sworn, deposeth and saith that on the 17th day of September, 1819, John S. Harper, with Thomas Orr and James McAlister, entered the banking-house of the office of discount and deposit of the Bank of the United States, in the town of Chillicothe, and under colour and authority of a warrant issued by Ralph Osborn, Auditor of Ohio, dated 15th day of Sept., 1819, entered the vault and took from thence and the banking-house aforesaid upwards of one hundred and twenty thousand dollars in specie and bank notes, the property of the Bank of the United States.

This deponent further states that he informed the said John S. Harper, before and at the time he was engaged in taking and removing the money and effects aforesaid, that the Circuit Court of the United States for the District of Ohio, on the 14th day of September, 1819, had enjoined Ralph Osborn, Auditor of Ohio, on the applica-

tion of the President, Directors, and Company of the Bank
page 124 of the United States, from proceeding in anywise against the said The President, Directors, and Company of the Bank of the United States, under the act of Ohio entitled "an act to levy and collect a tax from all banks and individuals and companies and associations of individuals that may transact banking business within this State without being authorized to do so by the laws thereof."

This deponent further states that at the same time he read and exhibited to the said John S. Harper a certified copy of the bill filed by the President, Directors, and Company of the Bank of the United States against Ralph Osborn, Auditor of Ohio, on which the injunction was allowed; also the subpœna and endorsement thereon.

W. CREIGHTON, Jun'r.

Sworn to and subscribed in open court, January term, 1820.

Att.: HARVEY D. EVANS, Clerk.

The following affidavits were offered and rejected by
page 125 the court:

W. Creighton, Jun'r, deposeth and saith that on the 17th day of September, 1819, when John S. Harper, Thomas Orr, and James McAlister entered the banking-house of the office of discount and deposit of the Bank of the United States, in the town of Chillicothe, under colour and authority of a warrant issued by Ralph Osborn, Auditor of Ohio, and took possession of the vault, he informed the said John S. Harper before and at the time he was engaged in taking and removing the money and effects from the vault and banking-house, amounting to upwards of one hundred and twenty-thousand dollars, that the Circuit Court of the United States for the District of Ohio, on the 14th September, 1819, had enjoined Ralph Osborn, Auditor of Ohio, on the application of the President, Directors, and Company of the Bank of the United States from proceeding in anywise against
the said the President, Directors, and Company of the Bank
page 126 of the United States, under the act of Ohio entitled "an act to levy and collect a tax from all banks and individuals and companies and associations of individuals that may transact banking business within this State without being authorized to do so by the laws thereof.

This deponent further states that at the same time he read and exhibited to the said John S. Harper a certified copy of the bill filed by the President, Directors, and Company of the Bank of the United States against Ralph Osborn, Auditor of Ohio, on which the injunction was allowed, also the subpœna and the endorsement thereon; and on reading and exhibiting the papers aforesaid, and cautioning the said John S. Harper against proceeding to take any money or effects from the vault and banking-house, the said John S. Harper declared his

disregard for the injunction and stated his determination
page 127 to execute his warrant, and proceeded with his associates to remove from the vault and banking-house the money and effects as aforesaid.

W. CREIGHTON, Jun'r.

Sworn to and subscribed in open court, Sep. 7, 1820.

HARVEY D. EVANS, Clerk.

Abraham G. Claypoole, being duly sworn, doth depose and say, that on Friday, the 17th day of September, 1819, between 12 and 1 o'clock, whilst he, the deponent, was occupied in the banking-room of the office of discount and deposit of the Bank of the United States in Chillicothe, in the State of Ohio, John S. Harper, Thomas Orr, and James McCallister suddenly entered the said banking-room, jumped over the counter, and before the deponent was aware of their being in the room, took possession of the vault; whereupon the deponent advanced for the purpose of removing them therefrom,
page 128 but was interrupted by said Harper, who had, unobserved by him, intruded himself behind the counter, and who, without any previous notice whatever, rudely demanded of deponent if he was prepared to pay the State tax, to which the deponent answered in the negative, denying the right of the State to impose it, and at same time moving towards the vault for the purpose aforesaid, but was perem-torily told by the said Harper, as well as his two companions, that he should not enter the same. The deponent did, notwithstanding, attempt to enter or obtain possession of the same, but was forcibly resisted by the two last-mentioned persons. A short pause then ensued, when (on demanding his authority) the said Harper produced a warrant from the State Auditor, directed to him and requiring him to levy on the said office of discount and de-
page 129 posit at Chillicothe the amount of the tax imposed by the State law of this State on the two branches of the Bank of the United States located therein; whereupon he was informed that the State had no just right, and he was reminded of the decision of the Supreme Court of the United States to that effect, and admonished that an injunction had been granted by the Circuit Court of the United States in the late session thereof, of which the Auditor of State had been notified; the president of the said office, producing and reading to them (the said Harper, Orr, and McCallister) the said injunction, and showing them the seal and endorsement thereon, and (together with the deponent) forewarning them against proceeding further, or touching any part of the funds or property of the said institution. Harper, nevertheless, declared his disregard for the injunction and his determination to execute the said warrant,
page 130 and while the president and deponent were reading the papers above mentioned, and afterwards importunately repeated his demand, which was refused. And after another effort on the part of the cashier to obtain possession of the vault (from which

he was forcibly prevented by the said Harper and one of his associates) they proceeded to remove and did carry away from said office of discount and deposit funds thereof to the amount of one hundred and twenty thousand three hundred and fifty-five dollars, of which twenty thousand three hundred and fifty-five dollars were subsequently returned, leaving the sum of one hundred thousand dollars, which sum is still withheld from the said office of discount and deposit.

ABR. G. CLAYPOOLE.

Sworn to and subscribed in open court, Sep. 7th, 1820.

page 131 Att.: HARVEY D. EVANS, Clerk.

The United States of America, District of Ohio, set.:

I, Harvey D. Evans, clerk of the Seventh Circuit Court of the United States in and for the District of Ohio aforesaid, do certify the aforegoing to be a true and correct transcript from the records in my office.

Seal of the Circuit Court of the United States for the Dist. of Ohio.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Columbus, this tenth day of December, 1823, and in the forty-eighth year of the American independence.

HARVEY D. EVANS, Clk.

Endorsed.

Osborn and al. ag't the Bank of the U. S. Certiorari to bring up the proceedings in the court below on the contempt committed by Osborn and Harper in their disobedience of the injunc-
page 132 tion which issued in this cause.

Osborn and others vs. Bank U. States. Sug. dim. March 8th, 1823.

SUPREME COURT OF THE UNITED STATES.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing manuscript pages, numbered from 1 to 132, inclusive, contain a true copy of the transcript of the record in the case of Ralph Osborn and others vs. The Bank of the United States, No. 19, February term, 1824, as the same remains upon the files of said Supreme Court.

In testimony whereof I hereunto subscribe my name and
[Seal.] affix the seal of said Supreme Court, at the city of Washington, this 2nd day of July, A. D. 1887.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Supreme Court of the United States.

Nos. 4, 5, and 6 (Original).

EX PARTE R. A. AYERS, J. D. McCABE, JOHN SCOTT.

Supplemental Brief of Wm. L. Royall, for Respondent, on Effect of Tender.

Judd & Detweiler, Printers.

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ABR. G. CLAYPOOLE.

Sworn to and subscribed in open court, Sep. 7th, 1820.

page 131 Att.: HARVEY D. EVANS, Clerk.

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[Seal.] affix the seal of said Supreme Court, at the city of Washington, this 2nd day of July, A. D. 1887.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

123-443

Supreme Court of the United States.

Nos. 4, 5, and 6 (Original).

EX PARTE R. A. AYERS, J. D. McCABE, JOHN SCOTT.

Supplemental Brief of Wm. L. Royall, for Respondent, on Effect of Tender.

Judd & Detweiler, Printers.

Supreme Court of the United States.

Nos. 4, 5, and 6 (Original).

EX PARTE R. A. AYERS, J. D. McCABE, JOHN SCOTT.

Supplemental Brief of Wm. L. Royall, for Respondent, on Effect of Tender.

Mr. Justice Bradley asked Mr. Tucker if there had not always been a law in Virginia providing that the State might sue for her taxes when she chose. The argument to be deduced from this question is that no harm can be done to the coupon-holder by the act of May 12th, 1887, ordering suits against him.

The distinction between that position and what we contend for is just this: If a tax collector, of his own volition, refused to receive coupons when offered, and puts the State in action against the taxpayer by way of suit, no injury, in the legal sense of injury, is done to that taxpayer. But what we complain of here is that the State has passed an act which, in substance, forbids the officer to receive the coupons when offered, and commands him to sue the taxpayer, although the taxpayer has never been liable to suit for one

moment from the time that he made his tender. We complain that this act of Assembly is inconsistent with her contract that the coupon would be received when offered.

If it should be said that the act of January 26th, 1882, is not to be read as part of the act of May 12th, 1887, and, therefore, that there is no express command in the latter act, that the officers shall refuse coupons when tendered, we reply that precisely the same objection was made to the act of January 14th, 1882, set out in Antoni *vs.* Greenhow (107th U. S. R., page 771); and this Court held in Chaffin *vs.* Taylor (116th U. S. R., page 557) that it was of no avail. The provisions of the act of January 14th, 1882, and of the act of May 12th, 1887, are precisely the same, so far as they prohibit the receipt of the coupons for taxes where offered. We ask the especial attention of the Court to the case of Chaffin *vs.* Taylor as it is reported in 116th U. S. R., and not in 114th U. S. R.

Mr. Justice Miller asked Gov. Chamberlain the following question: "Supposing I meet you in the street and offer you payment of a debt I owe you, which you refuse to receive, would that refusal preclude you thereafter from bringing an action against me for the money. We answer emphatically that it would not. Gov. Chamberlain could thereafter bring a suit against Mr. Justice Miller for that money at his own risk and cost; but that is not the case we have under consideration. The case we have under consideration is this: The State of Virginia agreed to receive her coupon at the instant it was offered. She now, by an act of Assembly, forbids her collectors to receive it at the instant when offered, and postpones the time for receiving it certainly ten days—

certainly at the end of a law-suit—and, as the law-suit may last ten years, possibly at the end of ten years.

Our complaint is that this act of the Legislature of Virginia impairs the obligation of the contract of the State that the coupon shall be received for taxes when offered.

LEGAL EFFECT OF VALID TENDER.

In the case of Poindexter *vs.* Greenhow (114th U. S. R.), this Court made the following repeated declarations as to the effect of a tender of the State's coupons by a tax-payer:

"In the hands of the tax-payer who buys them for tender they are practically no longer *choses in action*, but equal in value and quality to money and equivalent to receipts for taxes already paid." (Page 280.)

"As we have seen, the coupon-holder whose tender of genuine coupons in payment of taxes has been refused, stands upon the same footing in this respect as though he had tendered gold coin in similar circumstance and with like result." (Page 281.)

"The case, then, of the plaintiff below is reduced to this: He had paid the taxes demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property." (Page 282.)

"The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law and therefore a wrong." (Page 288.)

"The State has agreed that the coupons cut from her bonds shall be received in payment of taxes due to her, as though they were money. When the tax payer has ten-

dered such coupons has complied with the agreement, and in legal contemplation he has paid the debt he owed the State. So far as that tax is concerned, and every step taken for enforcing its payment in disregard of that tender, the coupon-holder is withdrawn from the power and jurisdiction of the State." (Page 300–301.)

ARGUMENT TO SHOW ON PRINCIPLE THAT VALID TENDER PAYS THE DEBT AND LEAVES DEBTOR BAILEE OF THE MONEY, BUT NO LONGER DEBTOR.

The Court gave me leave to reprint for this case from my brief in Poindexter *vs.* Greenhow what follows upon the effect of a tender. Some parts of what was there said are made unnecessary now by reason of what the Court said in its opinion in Poindexter *vs.* Greenhow. Nevertheless, as the whole subject was there discussed in its entirety, I think it best to reprint it all:

REPRINT FROM BRIEF IN POINDEXTER VS. GREENHOW.

The Coupon is a Legal Tender for the Tax.

I submit that the coupon is a legal tender for the tax.

The act of Assembly which authorized their issue provides that they shall be a good tender for taxes. Therefore the State has made an unequivocal contract that they shall be legal tender for taxes.

When the character of the coupons first came before the supreme court of appeals of the State of Virginia it decided that they were good legal tender for taxes. Antoni *vs.* Wright, 22 Gratt., 933.

The authority of this case was recognized in Wise *vs.* Rogers, 24 Gratt., 169.

The same proposition was reaffirmed in Clark *vs.* Tyler, 30 Gratt., 137.

And in Williamson *vs.* Massey, 33 Gratt., 237.

This Court held the same thing in Hartman *vs.* Greenhow, 102 U. S., 672.

In the last-named case this court says at page 679:

"A contract was thus consummated between the State and the holders of the new bonds and the holders of the coupons, from the obligation of which she could not, without their consent, release herself by any subsequent legislation. She thus bound herself not only to pay the bonds when they became due, but to receive the interest coupons from the the bearer at and after their maturity to their full amount for any taxes or dues by him to the State."

In Antoni *vs.* Greenhow, October term, 1882, this court said through Mr. Chief Justice Waite:

"*The right of the couponholder is to have his coupon received for taxes when offered.*"

"Any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract, and void as against coupon-holders."

Mr. Justice Mathews laid down the same proposition in his separate opinion. He said:

"I agree that the State of Virginia, by the act of 1871, entered into a valid contract with the holders of its bonds to receive their coupons in payment of taxes, *and that any subsequent statute which denies this right is a breach of its contract and a violation of the Constitution of the United States.*"

Therefore, by the language of the State's contract, by the four decisions of her own supreme court, by the two decisions of this Court, and by the opinion of each and every justice of this Court, the coupon is a legal tender for the tax.

Second.

There is nothing in the opinion of the Court in Antoni *vs.* Greenhow which is in conflict with this proposition, however much certain expressions may seem to be in conflict with it. Take, for instance, what is said of the right of the State to require prepayment of the tax in money. It was there held that she might require prepayment in money *as a condition precedent to the taxpayer compelling the officer by mandamus to receive the coupon.*

But it was not said that she could require prepayment in money as a condition precedent to the tender of the coupon being a valid and legal tender for the debt. It is one thing for a man to make a valid and legal tender for the debt that he owes, but quite another thing for him to seek to make his creditor receive what he tenders. If A owes B one hundred dollars, and on the day when it is due he offer B one hundred gold dollars, which B refuses to receive, B will not be allowed after that to molest A in respect to his claim; but if A should go to a court and ask for a *mandamus* to compel B to receive the money he would be laughed at.

I understand the decision in Antoni *vs.* Greenhow to mean that it is no part of the taxpayer's duty to PAY his tax. His duty is to OFFER to pay it, and if the State chooses to refuse his offer, she may do so—she may lie out of her revenue if she chooses; but that the taxpayer has done his full and entire duty when he makes the offer. Now, as he is

under no obligation to *pay* his tax, but only to *offer* to pay it, if he take upon himself the supererogatory task of compelling the State's officers to receive his coupons in payment of his tax, it is no hardship on him that he should be required to proceed about his uncalled-for task in the State's method rather than in his own. Therefore the court held that the State might require prepayment in money as a condition to his driving his coupon into the treasury by *mandamus;* but not as a condition to its being a valid and sufficient tender.

In discussing the validity of the provision of the act that required prepayment of the tax in money, the chief justice gives as a reason why the State might do this that promptness in the payment of the revenue and genuine money in her treasury are essential to the life of the State. However potent this consideration might be for demonstrating that the State of Virginia ought never to have made this contract, it does not advance one step towards proving that she did not make it, and that the coupons are not, therefore, legal tender. We must, therefore, suppose that he meant to apply this remark to the case that was actually before him, and to limit its influence to that case. We must suppose that he meant to say that this would justify the State, if nothing else would, in imposing this condition on those who sought to make her officers actually receive the coupons into the treasury, and not that it was a consideration of such cogency as to justify the State in passing a law that would deprive the coupons of their legal tender character.

The argument involved in the proposition that the necessity the State is under to have genuine money in her treasury, would justify her in enacting a statute depriving the

coupons of their legal tender character, and subjecting them to judicial scrutiny before they are to be received, deserves a more critical examination. It amounts to this: that where strong reasons exist why a State ought not to be bound by her contract, she will be allowed to release herself from it by her own act alone, which is the same thing as to say that the Constitution does not bind her, but the argument proves too much. If it is strong enough to justify the State in ordering her officers to refuse coupons, until they have been subjected to judicial examination, it will equally justify her in ordering them to refuse greenbacks until their genuineness has been established by judicial decision.

The reason supposed is the necessity the State is under for having genuine money in her treasury. But there are counterfeit greenbacks, and it is just as easy to counterfeit a greenback as it is to counterfeit a coupon. The State can no more utilize a counterfeit greenback that may be in her treasury than she can utilize a counterfeit coupon.

Therefore, if her necessity for having genuine money in her treasury would justify her in prohibiting her officers to receive her coupons until their genuineness was established by judicial decision, the same necessity would equally justify her in forbidding them to receive greenbacks until their genuineness was established by judicial decision.

Now the supreme legislative power of this land has declared the greenback to be a legal tender for all debt. It has declared that whenever a man owes a dollar, a tender of one of the promises of the United States Government to pay a dollar shall be a legal tender for that obligation. After a man has made a legal tender for what he owes which is refused, it is the same thing to him as if it was paid. What-

ever loss or damage ensues falls upon his creditor, and he bears no part of it, and if the creditor pursues him further he does so at his own peril.

Can it be said that the necessity the State is under to have genuine money in her treasury will justify her in forbidding her officers to receive genuine greenbacks in payment of her taxes, because it is possible that her officers may have spurious greenbacks imposed upon them? If A tenders what is truly a genuine greenback in payment of his taxes, and the officer refuses it and then levies on A's goods, is it possible that any State laws can shield this officer and exonerate him from his obligation to answer to A for his trespass?

And the argument may be carried still further. If the State's necessity will justify her in forbidding her officers to receive coupons and greenbacks, it will justify her in forbidding them to receive gold and silver, for there are counterfeit and spurious coins of both sorts. Can it be that when a man has tendered what is really the Government's gold coin, any power whatever can, for any reason, put him in default in respect to that debt. To state the proposition is to refute it.

Apart from the State's inhibition against impairing the obligation of her contract in the case of her coupon, and of the inhibition against her arresting the currency of the Government's money—in the case of the greenback and coin—the vice of the argument lies in supposing that there is any such thing as an unquestionable medium of payment. There is no such thing. In the history of the world there has never been any money used yet that could not be and was not counterfeited, and in the nature of things there can be none such. The State, therefore, like any individual,

must take her chances when she orders her officers to refuse coupons, greenbacks, or coin. If it turns out that the coupon, greenback, or coin that was refused was spurious coupon, greenback, or coin, then no harm has happened to any one. But if it turns out that the coupon, greenback, or coin was really and in point of fact genuine coupon, greenback, or coin, then the person tendering will have been in the right from the moment of his tender, and the person refusing it will have been in the wrong from the same moment, any State law to the contrary notwithstanding.

The truth is, supposing there were no question involved of the State being prohibited to impair the obligation of her contract, the method of forbidding her officers to receive all coupons until their genuineness was established by the verdict of a jury would not be the appropriate method for protecting herself against counterfeit coupons. To distinguish between a counterfeit coupon and a genuine coupon is, if the counterfeit is well executed, a task which requires the most delicate technical skill. Jurors certainly no not possess it, and it is not to be supposed that many judges possess it.

Therefore, the verdict of a jury finding a coupon to be genuine, or the opinion of a judge that a coupon is genuine, furnishes the State a very slight guarantee after all that she is not redeeming a spurious coupon. One really expert clerk who is thoroughly versed in the handling of paper money is worth all the juries of the State put together. The one KNOWS a counterfeit the instant he touches it or his eye falls upon it; the others are as apt to pass a counterfeit for genuine as they are to pass one that is really genuine.

The State's real security is to have a really expert accountant at the counter of her treasury to examine every coupon

that the collectors bring in, to receive from them those that are genuine and to reject those that are counterfeit. The State loses nothing if her collectors receive counterfeit coupons from the taxpayers. She is not bound to receive them from the collectors, and they, their bondsmen, and the taxpayers, all remain bound to her for her tax. The taxpayer has not paid his tax when he fools the collector into taking from him a counterfeit coupon. Therefore, when the collector brings to the treasury a coupon which is counterfeit, the State may go upon him and his bondsmen for what is due to her, or she may send the collector back after the tax-payer who imposed the spurious coupon on him. It matters not how many counterfeit coupons are in circulation, still, she cannot possibly lose by them if she will only have an expert at her treasury to examine those which the collectors bring in.

Therefore, it is clear that all the Chief Justice intended by what he said on this topic is, that the necessity the State is under to have revenue justifies her in requiring prepayment of the tax as a condition precedent to the tax-payer having the writ of *mandamus*, but not as a condition precedent to the coupon retaining its legal tender character.

Again, the Chief Justice says:

"It is no doubt true that the commercial value of the bonds and coupons has been impaired by the hostile legislation of the State, but this impairment, in our opinion, comes, not from the change of the remedies, but from the refusal to accept the coupons without suit."

Here is a distinct statement that the part of the law which prohibited the officer to receive the coupon—that part of it

which undertook to deprive it of its legal-tender quality—was what caused the depreciation in the commercial value of the bonds and coupons. Now, it is the settled doctrine of this Court that if a law causes a diminution in the commercial value of a security, that proves it to be a law impairing the obligation of a contract. Planter's Bank *vs.* Sharp, 6 How., 327; Von Hoffman *vs.* Quincy, 4 Wall., 553; Edwards *vs.* Rearzey, 96 U. S. R., 601.

The Chief Justice could not possibly, therefore, have intended to say that the part of the act which forbade the officers to receive the coupons was what caused their decline in value, but that the State might nevertheless enact that part of it.

Finally, the Chief Justice twice declares most emphatically that the court did not intend to sanction the part of the law which undertook to deprive the coupon of its legal-tender character.

He says:

"The question we are now to consider is not whether, if the coupon tendered is in fact genuine and such as ought, under the contract, to be received, and the tender is kept good, the Treasurer can proceed to collect the tax by distraint or such other process as the law allows, without making himself personally responsible for any trespass he may commit; but whether the act of 1882 violates any implied obligation of the State in respect to the remedies that may be employed for the enforcement of its contract if the collector refuses to take them."

And again:

"In conclusion we repeat that the question presented by this record is not whether the tax collector is bound in law to receive the coupon, notwithstanding the legislation which,

on its face prohibits him from doing so, nor whether, if he refuses to take the coupon and proceeds with the collection of the tax by force, he can be made personally responsible in damages for what he does, but whether the obligation of the contract has been impaired by the changes which have made in the remedies for its enforcement in case he refuses to accept the coupons. We decide only the question before us."

Tender Pays the Debt.

My next proposition is that after a tax-payer has tendered to the collector that which the collector ought to receive, the State's right to levy on that tax-payer's property is ended and done.

It is perfectly settled law that the landlord cannot levy upon the tenant's goods after the tenant has tendered him that which he ought to receive.

"John Matrever's case, it is held by the court that if the lord or his bailiff, comes to distrain, and, before the distress the tenant tenders the arrears upon the land, then the distress taken for it is tortious." The Six Carpenters' Case, 8 Coke's R., 147.

"So if the rent had been due when the lord came to distrain, and the tenant had tendered the rent, and notwithstanding the lord distrained; or, if the distress had been taken in the highway, within the lord's fee, and the tenant had made no tender; yet in either of these cases the tenant may rescue without the guilt of a disseision, because, in the first case, the distress *after the tender* was unlawful, for he had no right to those pledges to enforce the payment of a debt which was offered to be paid, and the distress in the highway was unlawful because prohibited by the statute, that being a place privileged for the encouragement of commerce,

and consequently, the rescue cannot be said to be a depriving the lord of means which he had no right to make use of, and so it is in the case of every unlawful distress." Gilbert on Rents, 103–4.

The real reason why there can be no distress after a lawful tender and refusal is that the tender *pays the debt.* There is no debt due to levy for after the tender.

"Now it may be observed that in every contract by which a party binds himself to deliver goods or pay money to another, he, in fact, engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or pay can amount only to a tender. *But the law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom delivery or payment was to be made.*" Rolfe, Baron, in Startup *vs.* MacDonald, 6 Man. & Granger, 610.

"The plea of tender is, in truth, a plea of performance of the contract, as far as the party contracting can perform it, and where money is to be paid the debtor cannot pay unless the creditor will receive it—a tender therefore at the time it is due is sufficient, because it is a payment as far as a debtor can pay." Parke, Baron, in Dobie *vs.* Larkan, 10 Exch., 778.

In Allan, Ex'or, *vs.* Westbrook, 1 Wilson R., 115, plaintiff's testator deposited a bond for £300, with defendant as collateral security for a loan of £22. When the money became due it was tendered and refused. The plaintiff sued the defendant for his bond. There was a question of variance, which caused the court to take time to consider, but each judge promptly expressed himself on the effect of the tender.

LEE, *Ch. J.*: "I give no opinion, but, as at present advised, think the plaintiff is well entitled to bring this action in the manner he has done, and the evidence is sufficient to support it, that the tender and refusal of the £22 amounts to payment."

DENNISON, *J.*: "In the present case, as the money was tendered and refused, I consider it as paid."

"There are some cases in which it has been held that where one party has satisfied the other as far as he could by tendering the money agreed, &c., which was refused, it may be pleaded." GROSSE, *J.*, in James *vs.* David, 5 D. & E., 143.

"Ordinarily, nothing less than actual performance satifies an engagement to do an act; but in acts which require the concurrence of both parties, if one party does all he can to perform his engagement, and the act remains undone, merely for the want of the concurrence of the other party, the party doing all in his power is entitled to the benefit of an actual performance. I speak not of the *semper paratus* and the *profert hic in curia.* They are incidental to some, and not to all engagements. It must, therefore, be the non-concurrence of the other party which discharges the defendant from the actual performance. *If one person is bound to pay money or deliver a horse to another, and that other will not receive it when offered, the party making the offer is excused ex necessitate rei from an actual performance.*" Miles *vs.* Huggins, 3 Devereux, N. C. R., 58.

If A promise to pay B one hundred dollars at twelve o'clock on the first day of July at the Washington Monument, and he tender B one hundred gold dollars at twelve o'clock on the first day of July at the Washington Monument, and B refuses to receive the money, A may deposit the money there and go away, and if B should ever sue him

he might plead these facts, and judgment would go in his favor.

Now if, however, instead of depositing the money, he elects to put it in his pocket and carry it away, he will undoubtedly be responsible to B for the money, but he will be responsible as a bailee without reward, and not as a debtor. The debt would have been paid by the tender, and his responsibility would be that of a man who officiously takes possession of another man's property, which he must guard and preserve with that care imposed upon him by the doctrine of Coggs *vs.* Bernard.

This must be so, because all that the debtor contracts to do is to make a *valid tender* of his debt. He does not contract to *pay* his debt, since he cannot by his contract force the creditor to *receive* payment, and the law will not hold him to have contracted to do that which it is beyond his power to do.

If this be not the full import and extent of the debtor's promise—if he remains bound to the creditor as debtor, after a valid tender and refusal, then it follows that if he be robbed by thieves on his way home, or if the public enemy take the money from him, or if he be swallowed up in an earthquake, he must, nevertheless, still pay his creditor when demand is made upon him. This, surely, cannot be. If A was at the Washington Monument at twelve o'clock on the fourth of July, and tendered one hundred gold dollars to B, according to the terms of his contract, which B refused, and on his way home he was robbed of the money, the loss must surely fall upon B and not upon A. Yet, unless the debt was paid by the tender, and A, by retaining possession of the money, had simply converted himself into a bailee

without reward, he would still be bound to produce the money in court when sued; but I insist that if B sued him after that it would be a good plea for him to show that he tendered it according to the terms of his contract; that B refused to receive it, and that he was robbed of it while returning home, and that this plea would be a good substitute for the production of the money in court. In Jeter *vs.* Littlejohn, 3 Murph., N. C. R., 186, the court distinctly recognizes the principle that a debtor cannot be compelled to preserve money *as debtor* after a tender and refusal. Speaking of a tender that had been made during the troubled and perilous times of the Revolution, it says: "Is it reasonable that a debtor should be required to preserve it"—the money tendered—"through a long period of such civil convulsions as that which occurred after the tender was made?"

This is certainly true of a contract to deliver specific articles.

"If the debtor be present in person, or by his agent, and makes a tender of specific articles at the proper time and place, according to contract, and the creditor does not come to receive them, or refuses to accept them, the better opinion is, that if the article be properly designated and set apart the debt is thereby discharged. * * * * * * But in Weld *vs.* Hadley, it was decided, after a very able discussion, that on a tender and refusal of specific articles the property did not pass to the creditor. This was contrary to the doctrine declared in other cases; and the weight of argument, if not of authority, and the analogies of the law would appear to lead to the conclusion that, on a valid tender of specific articles, the debtor is not only discharged from his contract, but the right of property in the articles tendered passes to the creditor. *The debtor may abandon the goods so tendered;*

but if he elects to retain possession of the goods it is in the character of bailee to the creditor, and at his risk and expense." 2 Kent's Com., page 509 (marg.)

"The tender of specific articles on the day appointed at the place specified for the performance is a satisfaction of the contract when a note is payable in specific articles, and if the tender be not accepted the right of action is not revived by a subsequent demand and refusal. *In such case the relation of the parties is changed to that of bailor and bailee.*" Bacon's Abridgement, Wilson's and Bouvier's Ed. (1852), Tender (F).

"It is true that property tendered is not *lost* to the creditor by his neglect or refusal to receive it, but it is also true that in the case of a tender of specific articles the courts in this State consider the contract to deliver or pay such artı-charged. *The tender, properly made, is a satisfaction of the demand; the debt is paid, and the articles tendered become the property of the creditor and afterwards are kept at his risk and expense.* In the case of Slingerland *v.* Morse, 8 Johns. R., 478, the court says, 'We consider it (the tender) a complete bar to the suit upon the contract.' In Shelden *v.* Skinner, 4 Wend., 528–'9, this subject was again considered by this court and such a tender held analagous; as it was in the last case cited, to the French consignation, whereby the debtor is discharged, the creditor must resort to the specific articles and to the person who tendered them as the *bailee* thereof. The relation of debtor and creditor no longer subsists between these parties, but that of *trustee* and *cestui que trust*, or bailor and bailee." (Lamb *v.* Lathrop, 13 Wend., 97.)

Now, if it be true that the promisor of specific articles is discharged from his debt by making a valid tender, why should not the promisor of money be likewise discharged from his debt by making a valid tender? What difference is there between the two contracts? There is no difference.

Each is a contract by the debtor *that he will offer* to deliver the thing promised at the time and place agreed on, and that is the full limit of each promise. In neither contract does the debtor promise that he will *deliver*, since to deliver requires the assent of the creditor, and he cannot force him to give that assent against his will, and the law will not hold the promisor to have contracted to do an impossible thing.

It is true that statements can be found in text-books, and in the opinions of judges that the person who tenders specific articles is discharged from his contract, but that he who tenders money that is refused is not discharged from his contract, and the reason given is that it would be unreasonable to hold a party bound after he has tendered specific articles because they are cumbersome, and he ought not to be compelled to carry away cumbersome and burdensome articles; whereas it gives him no inconvenience to carry away money in his pocket, and therefore he ought to remain chargeable therefor. I submit that this reasoning is wholly unsatisfactory. It is utterly inconsistent with the nature of the contract that the parties have made. It assumes to change the contract that the parties entered into into such an one as the court thinks that they ought to have made. There is no more reason to suppose that a debtor who promises to pay money at a time and place named intends to remain bound as a debtor and to take the risks of preserving the money from thieves after he has tendered it according to his promise than there is to suppose that the debtor who promises to deliver a hundred bushels of wheat at a time and place named intends to burden himself with the care of that wheat after he has offered it according to his contract.

Now, I submit that the basis of the plea "*tout temps prist*" is

the fact that no debtor owing money ever yet left the money at the place agreed on, and took the risk of that being a defence. I insist, therefore, that the necessity for the plea of "*tout temp prist*" has arisen from the fact that in all cases of tender of money and refusal, the debtor has chosen to keep the money in his pocket, and has thereby made himself *bailee* of it, and the plea intends to say that if he is bailee of it he must always be ready to deliver it to the bailor when it is demanded.

Instead, therefore, of the law being that a plea of tender must contain the averment "*tout temps prist*," correctly stated, the law is, that a plea of tender must show either that the debtor left the money at the place agreed on; or, if he brought it away, that he has always since been ready to deliver it to the debtor on demand, or that after leaving the place of tender he was deprived of the money by some accident that would constitute a defence for a bailee of property without reward.

I have been able to find no case in which a debtor pleaded that after he had tendered the money he was deprived of it by such force as would have constituted a defence for a bailee without reward. In all the cases that I have examined, in which it has been said that the tender does not pay the debt, the fact has been that after the tender the debtor retained possession of the money and had not lost it through superior force. Consequently, in every such case the judges have said more than they were required to say when declaring that a tender does not pay the debt. I insist, therefore, that the doctrine that a tender does not pay the debt rests upon *dicta* solely and not on decisions, and that when critically examined such dicta are found to be incorrect expositions of the law.

The proposition that a legal tender pays the debt is clearly contained in the case of Clarke *v.* Tyler, 30th Gratt., 137. Anything else is inconsistent with the judgment in that case.

The facts were that Clarke had been adjudged to pay a fine and to be imprisoned until the fine was paid. He tendered the officers who had him in custody a coupon in payment of his fine, and upon the coupon being refused he applied to the supreme court of appeals to be discharged from custody on a writ of *habeas corpus*. The court was confronted directly with the question whether or not Clarkes' duty was discharged. He was in possession of the coupon—that is, the State's officers were not in possession of it, and was his debt paid whilst the State had not received what would solve it was the question before the court. The court held that, having tendered that which was a legal tender, he was entitled to his discharge, and it did actually discharge him from custody. This could not have been done unless the court first held that the debt was paid, for the judgment under which he was held was that he should be kept in jail until the fine was paid. In delivering the opinion of the court, Christian, J., says, at page 141—

"But in point of fact the judgment for the fine is discharged to its full extent, so far as the State is concerned, because the coupon represents the obligation of the State for the face value of the coupon offered in payment of the fine."

In concluding the opinion of the court, he says, at page 145—

"It only remains for me to say that the petitioner has the right under the law to discharge the fine imposed upon him

by the hustings court with a coupon of a bond of the State which the State has agreed to receive in payment of 'all taxes, debts, dues, and demands due the State,' and that he must be discharged from further custody."

Now, in saying that the prisoner *had the right* to discharge the fine with a coupon the court meant that he *had discharged* the fine by tendering the coupon, for it discharged him from custody and made no order at all in respect to the coupon; it made no provision whatever for the State getting the coupon; it utterly ignored all relations between the State and the prisoner from the moment when the coupon was tendered and refused. The report of the case does not show this, but I have filed a certified copy of the record of the case with the clerk, and from that it appears that the court discharged the prisoner unconditionally. The prisoner's petition averred that he brought the coupon into court and that he was willing that the officer should take the same upon giving him a receipt in full. The court took no notice of this averment and simply ordered the prisoner's discharge, leaving the officer to get the coupon as he best could. See the order printed below in note.*

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*VIRGINIA:

In the Supreme Court of Appeals, held at the State Court-House in the City of Richmond, on Friday, the 5th day of April, 1878.

This day James Clarke was brought into court by James M. Tyler, sergeant and jailor of the city of Richmand, in obedience to the writ of *habeas corpus* yesterday awarded, and to the said sergeant directed; and the said sergeant having made a return to said writ, which the court, for reasons stated in writing and filed with the record, deemed to be insufficient, and the court being of opinion that the petitioner, James Clarke, was entitled to discharge the amount of the fine imposed upon him by the said hustings court of the city of Richmond in past-due coupons of the State, and that said Clarke is therefore illegally detained in custody, it is therefore ordered that he be discharged.

A copy.

Test: GEO. K. TAYLOR, *C. C.*

The foregoing order was filed in Poindexter *v.* Greenhow. If it has been lost, I ask the Court to let me file another.

W. L. R.

If a prisoner sentenced to pay a fine, and to remain in jail until it is paid, can procure his discharge from custody by showing that he has offered coupons for the fine can it be that a tax-payer's property can be seized for the tax after he has tendered a coupon?

So effective at common law was a valid tender that when a mortgagor tendered what he owed, although the legal title was in the mortgagee, and although he might be in possession of the premises, yet if he refused the tender it reinvested the mortgagor with the legal title, so that he might bring ejectment upon it.

Litt., sect. 334 *et seq.*
Co., Litt., 206 A *et seq.*
Wade's case, 5 Rep., 115.
Merrit *vs.* Lambert, 7 Paige Ch'y, 344.
Farmers' Ins. Co. *vs.* Edwards, 27 Wend., 541.
Kortright *vs.* Cody, 21 N. Y., 343.
Frost *vs.* Garkers' Savings Bank, 70 N. Y., 553.
Caruthers *vs.* Humphrey, 12 Mich., 270.
Van Husen *vs.* Kenmore Bank, 13 Mich., 303.
Cram *vs.* McGoon, 86 Ill., 431.

It is the settled law of this court that a tender of that which ought to be received for a tax produces exactly the same effect, so far as the rights of a tax-payer are concerned, as a receipt by the officer of what is tendered.

Bennett *vs.* Hunter, 9 Wall., 326.
Tacey *vs.* Irwin, 18 Wall., 549.
Atwood *vs.* Weems, 99 U. S., 183.
Kaufman *vs.* Lee, 106 U. S. R., 196.

The case of Thorndike *vs.* U. S., 2 Mason, 1, is the same as the case under consideration.

In 1814 the United States Government issued certain treasury notes which it agreed, by the act providing for their issue, should be receivable in payment of all taxes and debts due to the United States. After this one Thorndike, a collector of customs, fell in default to the Government some $27,000. When demand was made upon him for payment he tendered $27,000 of these notes. They were refused and suit was brought against him, and he pleaded the tender. The case was tried before Judge Story, who held that the tender of the notes was a legal tender and the Government should take nothing by her writ. (Thorndike *vs.* U. S., 2 Mason, 1.)

It is difficult to perceive any difference between that case and the case of a Virginia tax-payer suing a tax collector for an injury growing out of the collector's refusing coupons. If Thorndike was in no default after tender of the Government's notes it is difficult to understand how a Virginia taxpayer would be in default so as to justify a collector's levying upon his property after tender of a coupon. Can it be conceived that Judge Story would have held a United States officer justified in levying after Thorndyke had tendered his notes?

In one of the briefs filed for petitioners the point is made that the act of January 26, 1886, entitles the taxpayer, when sued under the act of May 12th, 1887, to call upon the State to produce the bond by which he may certainly prove his coupon. But what if she cannot produce it? He will not be allowed to resort to expert evidence and, therefore, he

must fail. But it was never intended that this act should redound to the benefit of a taxpayer. It was passed for the benefit of the State. It was passed when taxpayers were suing the State under "Coupon-crusher No. 1" (the act of January 14, 1882, Antoni *vs.* Greenhow, 107 U. S.), to cut taxpayers off from proving their coupons in those suits. The State is not bound unless she be named. It cannot be held that she can be required, under the act of January 26, 1886, to produce bonds in suits in which she is plaintiff under the act of May 12, 1887, passed more than a year later.

WM. L. ROYAL,
For Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

Nos. 4, 5 and 6 (original).

Ex Parte RUFUS A. AYERS, *Petitioner.*

Ex Parte JOHN SCOTT, *Petitioner.*

Ex Parte J. B. McCABE, *Petitioner.*

PETITIONS IN HABEAS CORPUS.

Brief for Respondent.

D. H. CHAMBERLAIN,
Of Counsel.

ALBERT B. KING, Printer, 19 Liberty Street, New York City.

Supreme Court of the United States.

OCTOBER TERM, 1887.

Ex parte RUFUS A. AYERS, Petitioner.	ORIGINAL. Nos. 4, 5, and 6.
Ex parte JOHN SCOTT, Petitioner.	
Ex parte J. B. MCCABE, Petitioner.	

Petitions in Habeas Corpus.

STATEMENT.

The record in each of the above-stated cases shows:

That on October 11th, 1887, counsel for the above-named petitioners submitted to this Court motions for leave to file petitions for writs of *habeas corpus*.

That on October 12th, 1887, this Court ordered that said motions be granted, and further ordered

that writs of *habeas corpus* issue as prayed in said petition, returnable October 17th, 1887.

The petition of Rufus A. Ayers, No. 4, represents that he is the Attorney-General of the State of Virginia; that in the performance of certain acts, which he alleges were within his official duty, he instituted, June 30th, 1887, the suit against the Baltimore & Ohio R. R. Co., which is mentioned in the record herein.

That said record shows that the suit in which certain orders of the Judge of the Circuit Court for the Eastern District of Virginia, were entered, and of which the petitioners now complain, is one over which the said Court had no jurisdiction;

That in said suit, on the 8th day of October, 1887, the said Court made an order upon a rule theretofore issued against the petitioner, to show cause why he should not be attached for contempt in disobeying the restraining order theretofore granted in the suit of *Cooper et al.* vs. *Marye et al.*, on the fifth day of June, 1887, and the petitioner's answer thereto, ordering and adjudging the said petitioner "guilty "of contempt in his disobedience of said order, "and that he do forthwith dismiss the said suit "against the Baltimore and Ohio Railroad Company "instituted by him in the Circuit Court of the city "of Richmond, and that for said contempt he be "fined the sum of $500 and stand committed in the "custody of the Marshal of this Court until the "same be paid, and he purge himself of his con-"tempt by dismissing said suit last herein men-"tioned."

That believing the said judge was without jurisdiction in the cause, the petitioner declined to pay the fine so imposed, or to comply with the other

requirements of said order, and thereupon, the petitioner was ordered by the said Judge into the custody of the United States Marshal for said district until he should comply with the requirements of said order ;

That the petitioner is now detained under said order in the custody of said marshal, and is held and confined by him in the city gaol of the city of Richmond;

That, as the said Judge was without jurisdiction over the said cause, in which said order last named was entered, and under which the petitioner is detained and imprisoned, the petitioner is now illegally detained and imprisoned without authority or due process of law.

Thereupon, the petitioner prays a writ of *habeas corpus*, to be directed to be directed to the said marshal, requiring him to bring the petitioner be-this Court (fols. a. to f).

The record accompanying the foregoing petition shows:

That in the Circuit Court of the United States for the Eastern District of Virginia, on June 6th, 1887, James P. Cooper, and five other named complainants, filed their Bill in Equity, No. 432, against Morton Marye, auditor of the State of Virginia; R. A. Ayers, Attorney-General; the Treasurers of the counties, cities, and towns in Virginia; and the Commonwealth's Attorneys of the counties, cities and towns in said state, whose names complainants pray leave to insert as they may be discovered.

This bill set forth that the orators, James P. Cooper, and five others, suing for themselves as well as for all others in like situation, &c., are citizens of the Kingdom of Great Britain ,

That by an Act of the General Assembly of the State of Virginia, approved March 30th, 1871, the State of Virginia authorized the issue of a large number of her bonds bearing interest coupons, which she thereby contracted should be received in payment of all taxes, debts, and demands due to her, and that thereafter many millions of dollars of said bonds were duly issued with said coupons attached ;

That by another act approved March 28th, 1879, the State provided for issuing another series of bonds with like interest coupons attached, whereof many millions of dollars were thereafter duly issued with said coupons attached ;

That said coupons, under both of said Acts, are payable to bearer, and are negotiable instruments for all time, free in the hands of any *bona fide* purchaser for value from any equity or burden whatever;

That there are now overdue and outstanding of said coupons in the hands of the public more than 4,000,000 of dollars ;

That from the time of the issue of said coupons, and their sale upon the markets of the world, the Legislature of the State of Virginia has sought to destroy the same and make them of no value, and that all the legislation referred to in this bill is a part of one scheme and plan to that end ;

That by the 10th Section of an Act, approved February 14th, 1882, all the officers of the State of Virginia are forbidden to pay and redeem said coupons, and that by an Act, approved January 26th, 1882, the collectors of taxes for Virginia, are forbidden to receive said coupons in payment of taxes ;

That after the enactment of the said two statutes,

in the year 1885, this Court in the case of *Poindexter vs. Greenhow*, decided that a tender of said coupons by a taxpayer "paid and extinguished said tax to the State, so as to deprive her Legislature of power to cause that taxpayer to be thereafter molested in respect of said tax;"

That while the Legislature of Virginia, by said two acts above mentioned, had made said coupons "valueless as claims upon said State for money or as mediums by which taxes due to her might be paid and extinguished, in the popular sense of these words, yet this decision of this Court attached to them an important value as tender in payment of taxes;" whereby the taxpayer could prevent the State from demanding anything else in payment of his taxes;

That said decision of this Court gave a certain intrinsic value to said coupons which justified the belief that the market value thereof would be greatly enhanced, and that acting on their faith in said decision, and the belief caused thereby that the State would be unable to further impair the value of said coupons as a tender for taxes, the complainants bought a large amount in the open market of the city of London and elsewhere, amounting to more than $100,000, at less than 50 cents on the dollar, the whole amount costing more than $30,000;

That complainants made this purchase for the purpose of selling such coupons to the taxpayers of Virginia, of which they have sold many to said taxpayers, and were justified in believing that they would be able to sell all of said coupons to said taxpayers at a considerable advance upon the price paid by complainants by reason of the quality established in said coupons by the said decision of this Court;

And that they have sold to said taxpayers of Virginia said coupons to the amount of $50,000, for more than $15,000, and that said taxpayers have tendered the same to the proper State officers in payment of their taxes due to said State, and that said officers have refused to receive the same in payment of said taxes; that the complainants do not own and cannot control the bonds from which said coupons were cut;

That while the aforesaid acts of the State of Virginia were in force forbidding the payment in money, and of the receipt of said coupons for taxes, the Legislature of said State, on the 12th day of May, 1887, enacted another statute, which is attached to the bill as Exhibit A, whereby the treasurer of each county, city and town in the State, is ordered to furnish to the Commonwealth's Attorneys, a list of all persons who have tendered coupons in payment of taxes, and said Commonwealth's Attorneys are ordered to institute suits in the name of said State against all such persons to recover judgments against them for the amount of said taxes; that said taxpayers are thereby required to submit to a judgment against them by default or to appear in Court and plead a tender of said coupons, and then prove affirmatively that the coupons tendered are the State's coupons and not counterfeit and spurious, the burden of proving the same being placed upon the taxpayer, and the coupons being taken to be, *prima facie*, spurious and counterfeit;

That said act is repugnant to Section 10 of Article I of the Constitution of the United States, because in connection with the act of January 26th, 1882, before mentioned, it requires the State officers to refuse all coupons, whether spurious or

otherwise, and then commands the State officers to bring suits against all those who have tendered coupons, whether the same are spurious or not; that it imposes heavy costs and fees upon the defendants, and makes the judgment to be recovered in said suits a perpetual lien upon the property of the taxpayer, and a perpetual cloud upon the title of said taxpayer to his property;

That by another act, approved January 26th, 1886, it is provided that upon a trial of the issue to be made under said act of May 12th, 1887, the defendant shall produce the bond from which said coupon tendered by him was cut and prove that it was cut from said bond;

That very few of said bonds are owned by persons residing in Virginia, and in 99 per cent. of the cases, Virginia tax payers would be unable to produce said bonds;

That by an act, approved January 21, 1886, it is provided that the taxpayer undertaking to prove a tender of coupons shall not be allowed to introduce expert evidence to prove the genuineness of the coupons, and that all coupons issued under either of said mentioned acts are engraved only and not signed manually;

That therefore, taxpayers who cannot produce said bonds upon said trial, will be unable to prove their coupons to be genuine; and that said act is a device and trick to deprive said coupons of their value as tender for taxes;

That the great bulk of taxpayers of Virginia pay small sums in taxes, and if the State officers are allowed to enforce said act of May 12th, 1887, the profit to be derived from purchasing the complainant's coupons will be too small to induce them to do so, and it will be impossible for said taxpay-

ers to use said coupons at all except in the very few cases in which they can produce the bonds from which they are cut ;

That the Supreme Court of Appeals for the State of Virginia has decided that said acts requiring said bonds to be produced and forbidding the use of expert evidence are not repugnant to the Constitution of the United States, and therefore, that, if the State officers are allowed to enforce said act of May 12th, 1887, the complainants will not only lose the profit which they have a right to expect they would make when they purchased said coupons, but will be unable to sell them to taxpayers of Virginia at any price, and thus their entire property in said coupons will be destroyed ; and that in any event, unless they are granted the injunction herein prayed for, they will lose a sum greater than $2,000 ;

That they are informed and believe and so charge that the treasurer of each county, city and town in said State, is about to report to each Commonwealth's Attorney the name of every taxpayer who has tendered coupons, and each Commonwealth's Attorney is going at once to institute the suits provided for in said Act of May 12th, 1887, against persons holding coupons bought from the complainants, as well as against all others ; and that they are informed and believe and so charge that in every case in which tenders of coupons have been made to the auditor, who is Morton Marye, to whom many tenders have been made, the said auditor, and R. A. Ayers, Attorney-General, are about to institute the suits which said Act provides for, whereby all coupons sold by complainants to Virginia taxpayers will be condemned as spurious, although they are all genuine ; and that all Virginia

taxpayers will be deterred from buying the coupons of the complainants and of all others in the future;

That very few, if any taxpayers of Virginia pay taxes amounting to sufficient to justify them in making the contest with the State provided for in said Act of May 12th, 1887, by appealing their cases to the Supreme Court of the United States, and that thus the complainants are absolutely deprived of the possibility of selling their coupons to any taxpayers whatever, except to the small number who might purchase with the intention of making such a contest with the State.

That the complainants are without remedy except in a Court of Equity.

The Bill thereupon prays:

1.—That Morton Marye, Auditor, R. A. Ayers, Attorney-General, and the Treasurer and Commonwealth's Attorney of each county, city and town in the State of Virginia may be made parties defendant to the Bill; and

2.—That they, their agents and attorneys, be restrained from bringing or commencing any suit provided for by said Act of May 12th, 1887, or from doing any other act to put said statute into force; and

3.—That, until the hearing of a motion for said injunction, a restraining order may be made to that effect; and

4.—That the complainants may have such other and general relief as the case may justify (fols. 1 to 7).

Exhibit A, filed with the bill, is a copy *totidem verbis* of the Act of May 12th, 1887. (Fols. 8 to 12.)

The record thereupon shows that on the 6th day of June, 1887, an order was made upon said bill, whereby "Morton Marye, auditor, R. A. Ayers, "Attorney-General, each and every Treasurer of a "county, city or town in the State of Virginia, and "each and every Commonwealth's Attorney for a "county, city or town in said State was restrained "from bringing or commencing any suit against any "person who has tendered the State of Virginia's "tax-receivable coupons in payment of taxes due "to said State as provided for and directed by "the act of the Legislature of Virginia, approved "May 12th, 1887, described in the bill and of which "a copy is attached thereto, and that each and all "of said parties, their agents and attorneys, be re-"strained from doing any act to put said statute "into force and effect until the further order of the "Court." It was further ordered that the motion for an injunction in this case be heard at Richmond on the first Monday of October, the Attorney-General or either of the defendants being allowed to move the Court for an earlier hearing, upon 10 days written notice to the solicitor of the complainants, and that a copy of the bill and the order be served upon the Attorney-General within ten days. (Fols. 12 to 14.)

The marshal's return shows (fol. 13) that the petioner Ayers, Attorney-General, was personally served with a copy of this order and with a copy of the bill.

The record further shows that on the 11th day of July, 1887, the Circuit Judge made an order in said cause commanding McIntosh, Treasurer of Loudoun County, Virginia, and J. B. McCabe, Commonwealth's Attorney for said county, to appear before said Court at Richmond to show cause why

each of them should not be attached for contempt in disobeying the restraining order heretofore granted in this cause (fol. 14).

The record next shows the execution of the order upon McCabe and McIntosh, together with the affidavit upon which the order was based, and the notice on the part of McCabe, as Commonwealth's Attorney, to certain persons in Loudoun County, of his intention to bring suit against them under the authority of the Act of May 12th, 1887 (fols. 14 to 20).

The record next presents the answer of J. B. McCabe to the rule against him to show cause, filed July 28th, 1887 (fols. 20 to 30).

On the 28th day of July, 1887, upon motion of the complainants, leave was granted them to file an amended bill, which is accordingly done, and the motion for an injunction in this case is to be heard upon the bill and the amended bill.

Such amended bill was filed on the 28th July, 1887, and appears in the Record, fols. 21 to 37.

Upon the same day, the hearing of the motion for a temporary injunction which had been fixed for the 28th July, 1887, was postponed to the 22d of September, "it being understood by the Court that nothing further shall be done in respect to questions at issue till the hearing, but that all proceedings shall remain in *statu quo*."

On the 23d of August, 1887, the Court made an order that John Scott, Esq., attorney for the Commonwealth for Fauquier County should show cause at Richmond on the 22d September, 1887, why he should not be attached for contempt in violating the restraining order made on the 6th of June, 1887. This order, together with the affidavits and other evidence on which it was based, appears in the record, fols. 38 to 45.

At fols. 46 to 59, appears the answer of John Scott to the rule served on him.

On the 24th day of September, 1887, leave was given the complainants to file a second amended bill, which appears at folios 59 to 60 ; and such second amended bill appears at folios 61 to 66 ; and upon this bill, and order was made restraining John R. Turner, Clerk of the Circuit Court of Fauquier County, from issuing any execution upon certain judgments against individuals therein named, and the Sheriff from levying or putting in force any execution upon said judgments.

The substance of this second amended bill is, that since the filing of the second amended bill and the issuance of the restraining orders, John Scott, Commonwealth's attorney for Fauquier County, had instituted suits against a number of persons in that county under the provisions of the Act of May 12th, 1887, and that judgments had been rendered against such persons in the Circuit Court for Fauquier County.

The complainants prayed that John R. Turner, Clerk of said Court, and one Whitacre, Sheriff of said county, and John Scott, attorney, be made defendants, and that the said clerk be restrained from issuing execution on said judgments, and the Sheriff from levying or putting in force any execution on said judgments.

On October 4th, 1887, leave was granted the complainants to file their third amended bill, and an order was made restraining William B. Foster, Clerk of the Circuit Court of Wythe County, from issuing execution upon judgments entered against individuals therein named, and the Sheriff from levying or putting in force any executions upon said judgments.

The substance of this third amended bill which appears at fols. 72 to 77 is that J. L. Gleaves, attorney for the Commonwealth for Wythe County, in violation of the restraining order had proceeded under the Act of May 12th, 1887, to procure judgments against certain persons therein named, and praying that said officers be restrained from further proceeding upon said judgments.

On October 8th, 1887, at a Circuit Court of the United States for the Eastern District of Virginia, at Richmond, the cause came on to be heard upon a motion of complainants for a preliminary injunction; whereupon the injunction was ordered to be issued "as prayed in the bill, and remain in force until the further order of the Court."

Thereupon, the complainants called the attention of the Court to the fact that the defendant R. A. Ayers, Attorney-General, was guilty of contempt in disobeying the restraining order of June 6th, 1887, whereupon the petitioner Ayers made answer to a rule against him, which answer appears at folios 85 to 87

Upon the hearing upon this rule the Court ordered and adjudged that "the said Rufus A. Ayers "is guilty of contempt in his disobedience of said "order and that he do forthwith dismiss the suit "of the Commonwealth *vs.* the Baltimore and "Ohio Railroad Company, instituted by him in the "Circuit Court of the City of Richmond, and that "for his said contempt, he be fined the sum of "$500 and stand committed in the custody of the "marshal of this Court until the same be paid, and "he purge himself of his contempt by dismissing "said suit last herein-mentioned" (fol. 87).

On the same day, a similar order was made in the matter of the alleged contempt of J. B. McCabe,

Commonwealth's Attorney for Loudoun County (fol. 78).

And on the same day, a similar order, excepting that the fine was reduced to $10, was made against John Scott, Commonwealth's Attorney for Fauquier County (fol. 89).

The opinion of the Circuit Judge, which was filed with the order granting the preliminary injunction, appears in the record, beginning at fol. 92 and extending to page 49.

Argument.

It will not be disputed that the only question arising now upon this record, is that of the jurisdiction of the Court below to make the restraining order of June 6th, 1887.

This question will depend upon:

(1.) The constitutional and statutory jurisdiction given to the United States Circuit Courts;

(2.) The sufficiency of the averments of the bill; and

(3.) The subject matter of the suit.

It was a characteristic remark of the late Mr. Justice Davis, in Furman *vs.* Nichol (8 Wall., 44), that the questions presented in that case were "of more importance than difficulty."

It it believed that all the questions which can be considered in determining the general question of jurisdiction of the Court below in these proceedings, can be determined without difficulty and by the simple application of cases already decided by this Court.

The chief peculiarity of these cases is found in

the fact that the defendants in the original bill—the petitioners in the present proceedings—are *officers of the State of Virginia.*

This fact suggests the foremost, if not the most important, question to be considered.

I.

Stripped of all disguises and reduced to its simplest statement, the question which arises under this view of the case, is, MAY A STATE OFFICER BE ENJOINED BY THE UNITED STATES CIRCUIT COURT FROM DOING WHAT AN UNCONSTITUTIONAL STATE STATUTE DIRECTS HIM TO DO?

Attention is called to this statement of the issue, for it is believed to express every consideration which is really involved in these cases.

What may be described as *two lines of cases*, bearing on this question, appear in the reported decisions of this Court;

One line, which tends to restrict the right of the Courts to act upon State officers for the enforcement of duties and obligations of the State towards private parties;

Another line, which tends to maintain such right and to enforce it somewhat broadly and fully.

These two lines of cases are marked in general by the distinction of *strict* and *liberal* construction which has prevailed so extensively and steadily in our judicial and political history, a distinction which is a natural and inevitable one, arising from the nature of human language as well as from the nature of the human mind.

The leading case in the first line of cases above referred to may be said to be the case of *Louisiana* vs. *Jumel*, decided by this Court in 1882, a case which was followed immediately at the same term by the case of *Antoni* vs. *Greenhow*, 107 U. S., 711 and 769.

Louisiana vs. *Jumel*, the Legislature of Louisiana, by a statute of 1874, provided for an issue of State bonds the the purpose of refunding existing series of State bonds.

This act provided in terms for the levy annually of a tax of 5½ mills on the dollar on the assessed value of all real and personal property in the State for the purpose of paying the interest and principal of these new bonds. The funds derived from this levy were directed to be kept apart and appropriated to that purpose and no other; and it was made a felony for any agent or officer or liquidator of the State to divert said funds from such purpose. This tax was further made "a continuing annual tax" until the principal and interest of the bonds should be paid or redeemed; and the appropriation of said funds was made "a continuing annual appropriation" during the same period; and it was made the duty of the officers, specified in the act, "to collect said tax annually and pay said interest and redeem said bonds until the same shall be fully discharged."

It was further provided in the same act that each provision of the act should be, and was declared to be, a contract between the State of Louisiana and each and every holder of such bonds.

Shortly after the passage of this act, the State adopted an amendment to its constitution declaring the said issue of bonds "to create a valid contract between the State and each and every holder of

said bonds which the State shall by no means and in no wise impair." And the said bonds were declared to be "a valid obligation of the State in favor of any holder thereof." And the Courts were forbidden to enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor.

In January, 1880, a new constitution of Louisiana went into effect, by which it was provided that the interest on the bonds issued under the Act of 1874, which bore 7 per cent. interest, should be fixed at 2 per cent. for five years, 3 per cent. for fifteen years thereafter, and 4 per cent. thereafter, and limiting the annual tax for the payment of said interest to three mills.

The new constitution further provided that the coupons of the bonds of 1874, falling due January 1, 1880, should be remitted and "any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the State government."

This case thus presented (1.) a contract between the State and individuals holding her bonds, whereby interest at 7 per cent, was secured to the holders by a perpetual levy and appropriation of taxes; (2.) a subsequent constitutional enactment reducing the rate of interest without the consent of the bondholders, and diverting funds already raised and in the treasury, from the payment of the interest to which they had been originally pledged and devoted.

There was in the Treasury of the State collected under the Act of 1874, at the time the suit of *Jumel vs. Louisiana* was begun, the sum of $300,000, to meet coupons falling due January, 1880.

Certain bondholders having demanded the payment of the coupons falling due January 1st, 1880,

and being refused, began suit in equity in the Circuit Court of the United States, against the State officers that constituted the Board of Liquidation, praying that the Act of 1874 might be declared a valid and subsisting law, as well as the constitutional amendment of 1874, and that under and by virtue of the contract embodied therein, they were entitled to all the taxes and monies raised in pursuance thereof; and that all legislation, statutory or constitutional, which altered or modified the provisions and terms of such contract were unconstitutional and void, aud that the defendants, the State officers, be required to replace to the credit of such interest fund all monies diverted therefrom, and be enjoined from recognizing as valid, the legislation of 1879 and 1880, and from doing any act to obstruct or prevent the execution of the legislation of 1874.

Subsequently the same parties, bondholders of 1874, filed a petition in the State Court against the auditor and treasurer of the State and the members of the board of liquidation, for a mandamus requiring them to pay the interest due January 1st, 1880, upon the bonds of 1874, and to apply thereto all funds levied and collected under the provisions of the legislation of 1874, and in general to perform the acts required for the execution of the contract of 1874.

The latter suit was afterwards removed into the Circuit Court of the United States.

By writ of error to the judgment and decree of the Court below, the cases were brought into this Court, where they were considered and decided together.

The Court held:

First.—That the Act 1874 and the bonds issued

thereunder were a contract of the State, and the Act and Constitution of 1879 was intended to prevent the execution of that contract according to its terms.

Second.—That as the bonds of the complainants had not been reduced to judgment and could not be, because no suit could be brought against the State "in its capacity as an organized, political community," the suits in question were "suits by creditors at large to compel by judicial process the officers of the State to enforce the provisions of the Act of 1874, when the State, by an amendment to its Constitution, has undertaken to prohibit them from doing so."

"The question," says the Court, page 721, "is whether the contract can be enforced notwithstanding the Constitution (of the State) by coercing the agents and officers of the State whose authority has been withdrawn in violation of the contract without the State itself, in its political capacity, being a party to the proceedings."

And at page 722, the Court says: "The remedy "sought implies power in the judiciary to compel "the State to abide by and perform its contracts "for the payment of money not by rendering and "enforcing a judgment in the ordinary form of "judicial procedure, but by assuming the control "of the administration of the fiscal affairs of the "State to the extent that may be necessary to ac- "complish the end in view."

And on page 72d, the Court says: "There is "nothing in any of the cases of this Court that are "relied on which, to our minds, authorizes any "such relief as is asked"; citing and commenting upon *Osborn* vs. *Bank of the United States*, 9 Wheat, 738; *Davis* vs *Gray*, 16 Wall., 203; *Board*

of Liquidation vs. *McComb*, 92 U. S., 531; and *United States* vs. *Lee*, 106 U. S., 196.

The scope and limit of this decision are clear. The suits were suits, in the judgment of this Court, not only to compel a State to execute its contract, but to compel it "by assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view"; that is to say, to the extent (1.) of restraining the fiscal officers of the State from applying the taxes collected to the use to which they were devoted by the legislation of 1879; and (2.) of compelling such officers to apply said funds to the payment of the principal and interest of the bonds as required by the legislation of 1874.

This, then, is the case of *Lousiana* vs. *Jumel*—a suit to restrain State officers from applying funds in the Treasury to the purpose designated by the political power of the State, and to compel such officers to apply such funds to the execution of a prior contract of the State.

The case of *Antoni* vs. *Greenhow*, 107 U. S., 769, was a petition for mandamus by Antoni against the Treasurer of the City of Richmond, to compel him to accept in payment of taxes, a coupon of the bond issue of 1871, which, by the terms of the act authorizing the issue, was made "receivable by all tax collectors in payment of all taxes, debts and demands due the State."

In 1882, the State of Virginia had passed an act providing, in substance, that upon the tender of coupons in payment of taxes, the tax collectors should receive the same for the purpose of "identification and verification," and, at the same time, should require the taxpayer to pay his taxes in

current funds; and upon such payment the taxpayer might bring his suit against the Commonwealth, and thereupon an issue should be tried by a jury, whether the coupons tendered were genuine legal coupons, and upon a decision of this issue in favor of the taxpayer, and a judgment in his favor, the money already paid by him for taxes should be repaid to him out of the treasury.

The act further provided that when a mandamus should be brought to compel a tax collector to receive coupons for taxes, the taxpayer should be required, first to pay his taxes in money, and thereupon an issue should be framed as to whether the coupons tendered were genuine coupons; and upon a final decision of this issue in favor of the taxpayer, a mandamus should issue requiring the coupons to be received, and thereupon the money already paid by the taxpayer should be refunded to him.

The Court held in this case, that the change of remedy effected by the Act of 1882 was not such a change as impaired the obligation of the coupon contract; and the Court limited itself strictly to this question, which was thus stated (p. 782). "In "conclusion, we repeat that the question presented "by this record is not whether the tax collector is "bound in law to receive the coupons, notwith-"standing the legislation, which on its face, pro-"hibits him from doing so, nor whether, if he re-"fuses to take the coupons and proceeds with the "collection of the tax by force, he can be made "personally responsible in damages for what he "does; but whether the obligation of the contract "has been impaired by the changes which have "been made in the remedies for its enforcement in "case he refuses to accept the coupons. We de-"cide only the question which is actually before us.

"It is no doubt true that the commercial value of "the bonds and coupons has been impaired by the "hostile legislation of the State; but this impair- "ment, in our opinion, comes not from the change "of the remedies, but from the refusal to accept "the coupons without suit. What we are called "upon to consider in this case is not the refusal to "take the coupons, but the remedy after refusal."

The case of Antoni *vs.* Greenhow was further distinguished by a separate opinion, concurred in by four of the Justices of this Court, all of whom concurred in the judgment of the Court, in which the decision was placed upon a different ground, which was thus stated:

"For a breach in its contract by a State no rem- "edy is provided by the Constitution of the United "States against the State itself; and a suit to com- "pel officers of a State to do acts which constitute "a performance of its contract by the State, is a "suit against the State itself."

It will thus be seen that *Antoni* vs. *Greenhow*, as presented by the opinion of the Court, decides no question as to the amenability of State officers to judicial process, either for the enforcement, or protection against impairment, of a State contract, and that the opinion of a minority concurring in the judgment of the Court goes only to the extent of holding that there is no remedy *against the State itself:* and that a suit *to compel State officers to do acts which constitute a performance of its contract*, is a suit against a State itself.

The case of *Conningham* vs. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, decided in 1883, was a suit by a citizen of the State of Virginia against the Governor and Treasurer of the State of Geor-

gia, the defendant railroad company, and certain directors of the company and other citizens of the State of Georgia.

In that case the State of Georgia had endorsed the bonds of the railroad company, and taken a lien upon the road as its security. The company having failed to pay interest, the Governor took possession of the road, put it in the hands of a Receiver, who sold it to the State. The State then took possession of the road, and substituted its own bonds in the place of the endorsed bonds of the company. The holders of second mortgage bonds of the same company, issued after the State's endorsement of the former bonds and before the company's default in interest, filed a bill in equity to foreclose their mortgage and to set aside the former sale to the State, and to be let in as prior in lien. The State officers—the Governor and Treasurer—demurred, and the Court below dismissed the bill.

In deciding this case, the Court examines the general question of judicial proceedings affecting a State, to which the State is not a party.

Taking, as a point of departure, the principle that neither a State nor the United States can be sued as defendant in any Court in this country without their consent, except in cases of original jurisdiction of this Court, the Court says: "Whenever it can be clearly seen that the State is an "indispensable party to enable the Court, according to the rules which govern its procedure, to "grant the relief sought, it will refuse to take "jurisdiction."

The Court then says that the Courts "have in "some instances gone a long way in holding the "the State not to be a necessary party, though

" some interest of hers may be more or less affect-
" ed by the decision." The Court then undertakes to classify these cases, which, it remarks, are " based upon principles whose soundness cannot " be disputed," thus :

1.—Cases where property of the State, or property in which the State has an interest, comes before the Court or under the control without being taken forcibly from the possession of the government, where the State may, if it choose, intervene to claim or protect its rights.

2.—Where individuals are sued in tort for some act injurious to another, in regard to person or property, where his defense is that he acted under the orders of the government. In these cases, the Court says: he is not sued as, or because he "is, " the officer of the government, but as an individ-
" ual, and Court is not ousted of jurisdiction be-
" cause he *asserts* authority as such officer. To
" make out his defense he must show that his au-
" thority was sufficient in law to protect him," and to this class the Court assigns the case of the United States *vs.* Lee (106 U. S., 196).

3.—Cases where "the law has imposed upon an
" officer of the Government a well-defined duty in
" regard to a specific matter not affecting the gen-
" eral powers or functions of the Government, but
" in the performance of which one or more individ-
" uals have a distinct interest, capable of enforce-
" ment by judicial process."

Under this head, the Court refers to the case of *Davis* vs. *Gray*, 16 Wall , 203, and remarks that " It is clear that in enjoining the Governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doc-

trine, if not beyond it, and that the principle should be extended no further;" but remarks that in that case, no "affirmative relief was granted by ordering the Governor and Land Commissioner to perform any act towards perfecting the title of a company."

The Court also refers to the case of *Board of Liquidation* vs. *McComb*, 92 U. S., 531, which, it declares, "is as far as this Court has gone in granting relief in this class of cases," meaning, of course, affirmative or positive relief.

The Court further refers to *Osborne* vs. *Bank*, and to *Louisiana* vs. *Jumel*, and in concluding its examination, the Court says, after remarking that the foregoing cases mark with reasonable precision the limit of the power of the Courts in cases affecting the rights of the State or Federal government, in suits to which they are not voluntary parties, that "IT IS NO ANSWER FOR THE DEFENDANT TO SAY: I AM AN OFFICER OF THE GOVERNMENT, AND ACTED UNDER ITS AUTHORITY," UNLESS HE SHOWS THE SUFFICIENCY OF HIS AUTHORITY.

In *Hagood* v. *Southern*, 117 U. S., 52, a suit in equity was brought by the assignees of the Blue Ridge R. R. Company against the Comptroller-General of the State of South Carolina, and the several County Treasurers within the State, praying that the defendants, the County Treasurers, "may be decreed to receive the said revenue bond "scrip in payment of said taxes due by your "orator to the State of South Carolina, and that "on their refusal to do so, they may be enjoined "from enforcing the said tax by selling the prop-"erty of your orators or in any other manner, and "that, on such refusal, the lien of said taxes on

"the property of your orators may be declared to "be discharged."

Stating the case as it was presented by the com- "plainants in this Court, the Court says: "Treat- "ing the repealing act as of no force, the inference "is drawn that the duty of the officers of the State "remains as declared and defined by the Act of "March 2d, 1872, and its performance may be en- "forced by judicial process in behalf of everyone "having a legal interest in the subject."

In view of this contention of the complainants, the Court says (page 67): "The controversy in "which the validity and obligation of the scrip are "involved, is the subject of the present suits. The "complainants, as holders of this scrip, in behalf "of themselves and all other holders choosing to "take part, are seeking to obtain by judicial pro- "cess, its redemption by the State, according to the "terms of the statute in pursuance of which it was "issued by the levy, collection, and appropriation "of special taxes pledged to that purpose, as "they claim, by an irrepealable law, constituting a "contract protected from violation by the Consti- "tution of the United States. * * * These "suits are accurately described as bills for specific "performance of a contract between the complain- "ants and the State of South Carolina, who are "the only parties to it. But to these bills, the "State is not in name made a party defendant, "though leave is given to it to become such if it "chooses; and except with that consent it could "not be brought before the Court and be made to "appear and defend. * * * Though not no- "minally a party to the record, it is the real and "only party in interest, the nominal defendants "being the officers and agents of the State, having

" no interest in the subject matter of the suit, and
" defending only as representing the State. And
" the things required by the decrees to be done and
" performed by them are the very things which,
" when done and performed, constitute the perfor-
" mance of the alleged contract by the State. The
" State is not only the real party to the controversy,
" but the real party against which relief is sought
" by the suit, and the suit is therefore substantially
" within the prohibition of the XI amendment to
" the Constitution of the United States. * * *
" The case thus comes directly within the authority
" of *Louisiana* v. *Jumel*, 107 U. S. 711. * * *
" In the present cases the decrees were not only
" against the defendants in their official capacity,
" but, that there might be no mistake as to the
" nature and extent of the duty to be performed,
" also against their successors in office."

The Court proceeds to point out the distinction between this case and *Osborn* vs. *Bank*, *Davis* vs. *Gray*, *Board of Liquidation* vs. *McComb*, and *Allen* vs. *Baltimore & Ohio R. R. Co.*

The cases now examined are all the cases in this Court which, in our judgment, can be said to belong to that line of cases which we have described as restricting or delimiting the extent to which the judicial process may be applied for the protection of contract rights, invoked on behalf of private complainants. The boundaries which these cases mark out are as distinct, probably, as the nature of the subject admits of. Stated in a condensed form, they go to the extent of declaring,

1.—That when positive, affirmative relief is sought, by the enforcement, through judicial process, of a State's contracts, although the State officers only are the defendants, the suit is in substance a suit

against the State, and barred by the XI Amendment.

2.—That when the relief sought, as in *Louisiana* vs. *Jumel*, goes to the extent of requiring the Courts to virtually assume control and administration of a part of the executive functions of the State government, the suit is not only in substance against the State, but it calls for a usurpation by the Courts of the functions of the political sovereign.

We confidently lay it down that the above statement gives the full and entire scope to which the decisions of this Court have hitherto gone in the direction of restriction upon the judicial power in its relations to State obligations; in other words, in the direction of a *strict* construction upon the general question here involved.

We turn now to the second line of cases which we have described as maintaining somewhat broadly and fully the right and duty of the Courts to exercise the judicial power in protecting rights embodied in State contracts, and guarded by the Constitution of the United States.

The earliest and most commanding authority, as well as, perhaps, the amplest expression of the judicial power and duty in such cases, is *Osborn* vs. *Bank of the United States*, 9 Wheaton, 738.

We do not hesitate to say, with boldness and a high degree of confidence, that we rely upon that case as warranting all the relief which was sought in the suit below out of which these proceedings have sprung.

The Court is here presented with the printed record at large of this case, as it lies in the archives of this Court, which shews more fully than the report in Wheaton, that, on all points, it is an ex

press authority in support of the positions of the complainants in this bill.

The record shows, in brief, that:

The subpœna in that suit, summoning Ralph Osborn, Auditor of the State of Ohio, is dated September 14, 1819, in the Seventh Circuit Court of the United States for the Ohio District.

The bill recited the provisions of the Act of the Ohio Legislature of Feb. 8, 1819, entitled, "An Act to levy and collect a tax from all banks and individuals, companies and associations of individuals, that may transact banking business in this State, without being authorized to do so by the laws thereof."

It recited especially the third section of the act, whereby the Auditor of the State was directed to make out his warrant to any person appointed by him to execute the same, "commanding him to collect the amount of tax in said warrant specified, from the Bank of the United States," &c.

It charged that said Auditor "daily gives it out "in speeches that he will execute and enforce the "provisions of the said Act of Ohio against your "orators, all of which is evidently contrary to "equity, the true spirit and meaning of the Con- "stitution of the United States, and the Act of the "Congress of the United States aforesaid, whilst "at the same time it tends to the manifest injury "and oppression of your orators, and *virtually* "*leads to the entire destruction and deprivation* "*of the rights and privileges conferred upon* "*your orators by the Constitution of the United* "*States and the Act of Congress aforesaid.*"

It prayed the Court "the premises considered, to "stay and enjoin said Ralph Osborne, auditor, "aforesaid, and all others whom it may concern,

" &c., *from proceeding against your orators un-*
" *der and in virtue of the Act of Ohio aforesaid,*
" *or any section, part, or provision thereof,*
" and particularly * * * from charging the
" Bank of the United States with a tax of $50,000,
" &c., *from making out any warrant appointing*
" *or authorizing any person to execute all,*
" *either, or any of the provisions of the said Act,*
" &c., * * * until your orators can be heard in
" the premises; and finally that the said injunc-
" tions so prayed for may be made perpetual."

On September 18, 1819, an injunction issued, attested by the Hon. John Marshall, Chief Justice of the United States of America, wherein it was, after appropriate recitals, declared:

" We do, therefore, in consideration of the prem-
" ises aforesaid, strictly enjoin, order, and com-
" mand you, the said Ralph Osborne, anditor as
" aforesaid, and all and every the persons before
" mentioned * * * *that you and every of you*
" *do absolutely desist and refrain from proceeding*
" *in any wise against the complainants under*
" *and by virtue of any section, part, or provision*
" *thereof, and particularly,*" &c.

This injunction was served, and returned in open Court at the January Term of 1820, and afterwards at the same term the complainants exhibited an amendatory and supplemental bill, alleging that since the filing of the former bill, the defendant Osborn had employed one Harper to collect said tax, and said Harper had proceeded " to enter the
" office of orators at Chillicothe, and to forcibly
" take in specie and bank notes, $100,000, belong-
" ing to, or on deposit with, your orators"; and that thereafter, said Harper had delivered the same to one Curry, successor to Osborn as State

Treasurer, or to the defendant Osborn; that the said Curry or Osborn had subsequently delivered the same to one Samuel Sullivan, successor to Curry as State Treasurer, who had kept said sum separate and apart from other moneys, so that the sum was capable of being produced.

The bill prayed that the defendants, particularly the said Sullivan, might answer respecting the allegations, &c., &c., and that in the meantime they, particularly the said Sullivan, be "enjoined "and restrained from negotiating, delivering over, "or in any manner parting with, or disposing of, "said money or any part thereof; that the said "defendants be also severally and jointly *enjoined* "*and restrained from proceeding under the law* "*or pretended law of Ohio referred to in the origi-* "*nal bill, to collect any tax or pretended tax now* "*or hereafter due or payable from your orators*"' &c., &c.

Subpœnas to Osborn, Curry, Sullivan and Harper having issued upon the amended bill, and a rule being entered requiring defendants to answer within 90 days, the defendant Curry filed an answer, sworn to October 30, 1820, and a decree, *pro confesso*, as to the other defendants was entered in December of the same year.

Thereafter, January 2, 1821, Sullivan having failed to answer, an attachment was ordered and issued, to which Sullivan filed his answer and was discharged from the attachment; and thereupon, September 5, 1821, the Circuit Court made its final decree whereby, after decreeing the payment by the defendants to the complainants of the sum of $100,000, the amount taken from the bank, with interest, on or before September 6, 1821, it was

"*Adjudged, ordered and decreed* that the de-

" &c., *from proceeding against your orators un-*
" *der and in virtue of the Act of Ohio aforesaid,*
" *or any section, part, or provision thereof,*
" and particularly * * * from charging the
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" *or authorizing any person to execute all,*
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"*Adjudged, ordered and decreed* that the de-

"fendants, and each of them, be perpetually en-
"joined from proceeding to collect any tax which
"has accrued or may hereafter accrue from the
"complainants under the Act of the General As-
"sembly of Ohio in the bill and proceedings men-
"tioned."

At the September term, 1821, by decree of Court, the defendants were ordered on or before the 6th day of September, 1821, to pay over for the complainants the said sum of $100,000 to one Creighton, appointed to receive the same, the former injunction being repeated in the same decree *in extenso*.

Sullivan having failed to perform the decrees on September 6, 1821, Sullivan and Osborn were ordered to show cause why they should not be attached "for a contempt committed by them in not "performing the decree of this Court."

Osborn and Sullivan having answered this order to show cause, an attachment was issued on the 7th of September, 1821; and on the 8th of September,

"IT IS ORDERED BY THE COURT THAT HE (SULLI-
"VAN) BE COMMITTED AND STAND COMMITTED UN-
"TIL HE PERFORM THE SAID DECREE, AND HE IS
"REMANDED TO THE CUSTODY OF THE MARSHAL
"FOR THE DUE EXECUTION OF THIS ORDER."

Afterwards, on September 10, Sullivan having refused to perform the decree,

"It is ordered that a writ of sequestration be is-
"sued forthwith to the complainants to sequester
"the real and personal estate of the said defend-
"ant and the identical sum of $100,000 in the said
"decree mentioned and described, until the said
"defendant discharge himself of the contempt for
"which he is now in confinement, and until the
"further order of the Court."

Thereupon a writ of sequestration was ordered, issued and executed September 10, 1821.

And on the same day, the commissioners appointed to execute the writ of sequestration, reported that they had sequestered $98,000; whereupon

"It is ordered that the said sum be paid over to "them (the complainants) and the defendants having prayed an appeal which has been allowed "them, the defendant Sullivan, by consent of the "complainants, is discharged from custody. But "this discharge is to be without prejudice to any "measure which may be necessary to be pursued "to enforce payment of the costs," &c.

At the January term, 1820, a rule was granted upon Osborn and Harper to show cause why an attachment should not issue against them for "a contempt for disregarding the process of injunction issued on the 14th, and also on the 18th day of September, 1819." And Osborn and Harper having appeared and shown cause, at the same term of Court, an attachment was issued against Osborn and Harper; whereupon they appeared in Court and surrendered themselves and were admitted to bail in the sum of $2,000 each, conditioned for their appearance from day to day.

Interrogatories having been propounded to each of the defendants, Osborn and Harper, and they having answered to the effect that they were not duly served with the injunction, the proceedings upon the attachment were by agreement of the parties "dismissed at defendants' cost".

Upon an agreed statement of facts dated September, 1821, in addition to this record as filed, the cause came to this Court.

Among the seven points, as stated by Chief Jus-

tice Marshall, on which the appellants (State officers) relied in this court, was this:

"5. Because, the cause made by the bill does "not warrant the interference of a Court of Chan- "cery by injunction." 9 Wheaton, pp., 328, 329.

At pp. 338—342, Chief Justice Marshall passes upon this objection. The records of English or American decisions do not contain nobler or more unassailable reasoning.

"5. The fifth objection to the decree is, that the "case made in the bill does not warrant the inter- "ference of a Court of Chancery."

"In examining the question, it is proper that the "Court should consider the real case, and its act- "ual circumstances. The original bill prays for "an injunction against Ralph Osborn, Auditor of "the State of Ohio, *to restrain him from executing* "*a law of that State, to the great oppression and* "*injury of the complainants, and to the destruc-* "*tion of rights and privileges conferred on them* "*by their charter, and by the Constitution of the* "*United States.*" The true inquiry is, *whether* "*an injunction can be issued to restrain a person* "*who is a State officer, from performing any offi-* "*cial act enjoined by Statute;* and whether a "Court of Equity can decree restitution, if the "act be performed. In pursuing this inquiry, it "must be assumed, for the present, *that the act is* "*unconstitutional, and furnishes no authority* "*or protection to the officer who is about to pro-* "*ceed under it.* This must be assumed, because, "in the arrangement of his argument, the counsel "who opened the cause, has chosen to reserve that "point for the last, and to contend that, though "the law be void, no case is made out against the "defendants. We suspend, also, the considera-

" tion of the question, whether the interest of the " State of Ohio, as disclosed in the bill, shows a " want of jurisdiction in the Circuit Court, which " ought to have arrested its proceeedings. That " question, too, is reserved by the appellants, and " will be subsequently considered. The sole in- " quiry, for the present, is, whether, stripping the " case of these objections, the plaintiffs below " were entitled to relief in a Court of Equity, " against the defendants, and to the protection of " an injunctien. The appellants expressly waive " *the extravagant proposition, that a void act can* " *afford protection to the person who executes* it, " and admit the liability of the defendants to the " plaintiffs, to the extent of the injury sustained, " in an action at law. The question, then, is re- " duced to the single enquiry, *whether the case is* " *cognizable in a Court of Equity.* If it is, the " decree must be affirmed, so far as it is supported " by the evidence in the cause.

" The appellants allege that the original bill con- " tains no allegations which can justify the applica- " tion for an injunction, and treat the declarations " of Ralph Osborn, the auditor, that he should ex- " ecute the law, as the light and frivolous threats of " an individual, that he would commit an ordinary " trespass. But surely this is not the point of " view in which the application for an injunction " is to be considered. The Legislature of Ohio " had passed a law for the avowed purpose of " expelling the Bank from the State, and had made " it the duty of the Auditor to execute it as a min- " isterial officer. He had declared that he would " perform this duty. The law, if executed, would " unquestionably effect its object, and would de- " prive the bank of its chartered privileges, so far

"as they were to be exercised in that State. It "must expel the bank from the State; and this is, "we think, a conclusion which the Court might "rightfully draw from the law itself. That the "declarations of the Auditor would be fulfilled, "did not admit of reasonable doubt. *It was to be "expected, that a person continuing to hold an "office, would perform a duty enjoined by his "government*, which was completely within his "power. This duty was to be repeated until the "bank should abandon the exercise of its char-"tered rights.

"To treat this as a common casual trespass, "would be to disregard entirely its true character "and substantial merits. The application to the "Court was, to interpose its writ of injunction, to "protect the bank, not from the casual trespass of "an individual, who might not perform the act he "threatened, but from the total destruction of its "franchise, of its chartered privileges, so far as "respected the State of Ohio. It was morally "certain, that the Auditor would proceed to exe-"cute the law, and it was morally certain, that the "effect must be the expulsion of the bank from "the State. An annual charge of 100,000 dollars, "would more than absorb all the advantages of "the privileges, and would consequently annul it.

"The appellants admit, that injunctions are often "awarded for the protection of parties in the en-"joyment of a franchise; but deny that one has "ever been granted in such a case as this. But, "although the precise case may never have oc-"curred, if the same principle applies, the same "remedy ought to be afforded. The interference "of the Court in this class of cases, has most fre-"quently been to restrain a person from violating

"an exclusive privilege, by participating in it. "But if, instead of a continued participation in "the privilege, the attempt be to disable the party "from using it, is not the reason for the interfer- "ence of the Court rather strengthened than weak- "ened? Had the privilege of the bank been ex- "clusive, the argument admits that any other per- "son or company, might have been enjoined, ac- "cording to the regular course of the Court of "Chancery, from using or exercising the same busi- "ness. Why would such person or company have "been enjoined? To prevent a permanent injury "from being done to the party entitled "to the franchise or privilege; which in- "jury, the appellants say, cannot be estimated "in damages. It requires no argument to prove "that the injury is greater, if the whole privilege "be destroyed, than if it be divided; and, so far "as respects the estimate of damages, although "precise accuracy may not be attained, yet a rea- "sonable calculation may be made of the amount "of the injury, so as to satisfy the Court and "jury. It will not be pretended, that, in such a "case, an action at law could not be maintained, "or that the materials do not exist on which a ver- "dict might be found, and a judgment rendered "But in this, and many other cases of continuing "injuries, as in the case of repeated ejectments, a "Court of Chancery will interpose. The injury "done, by denying to the bank the exercise of its "franchise in the State of Ohio, is as difficult to "calculate, as to the injury done by participating "in an exclusive privilege. The single act of "levying the tax in the first instance, is the cause "of an action at law; but that affords a remedy "only for the single act, and is not equal to the

"remedy in Chancery, which prevents its repetit-
"ion, and protects the privilege. The same con-
"servative principle, which induces the Court to
"interpose its authority for the protection of ex-
"clusive privileges, to prevent the commission of
"waste, even in some cases of trespass, and in many
"cases of destruction, will, we think, apply to
"this. Indeed, trespass is destruction, where there
"is no privity of estate."

The Court then considers the question of parties, holding that State officers are not the State, and are liable to the processes and restraints of the Courts.

And the decree was affirmed in this Court, except as to interest on the $100,000 while the State officers were enjoined from using the same.

It is sometimes sought to minimize the scope and force of this decision by representing it as affecting only the question of *the restoration of the money seized from the bank*. An examination of the case shows as we have seen, that the decree below not only decreed the restoration of the funds seized, but decreed a perpetual injunction against the defendants, State officers, "from proceeding to collect any tax which has accrued or may hereafter accrue from the complainants, *under the Act of the General Assembly of Ohio, in the bill and proceedings mentioned.*" In other words, the State officers were forever enjoined from carrying into effect, or executing, the statute in question, *a statute which commanded them in terms to do what the Circuit Court enjoined.*

The succession of human events seldom presents two cases more nearly identical in principle than *Osborn* vs. *Bank*, and the present case,—an identity

stronger and more controlling than any identity of mere facts,—and on the authority of that case we rest this.

The next important case involving similar questions in this Court, is *Davis* vs. *Gray*, 16 Wall., 203.

In that case, a person who had been appointed Receiver of a railroad holding a large grant of lands, made to it by the State, sought to enjoin the officers of the State which, by the adoption of a new constitution, had declared said grant forfeited to the State, for the benefit of its school fund, from granting said lands to other persons.

The suit was brought against Davis, Governor of the State, and Keuchler, Land Commissioner of the State.

These facts certainly make the case even stronger or more emphatic, in its direction, than *Osborn* vs. *Bank*.

The case was decided here in 1872, the Chief Justice and one associate dissenting.

The Court held, unqualifiedly, that a Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution of the United States, when such execution will violate the rights of the complainant;

That, where the State is concerned, it should be made a party, if it can be done; but that the fact that it cannot be done is a sufficient reason for omitting to do it, and the case may proceed to decree against the State officers, in all respects as if the State were a party to the record.

And, finally, that, in deciding who are parties to the suit, the Court will not look beyond the record; and that, making a State officer a party

does not make the State a party, though the State's statute may prompt the officer's action, and she may stand behind him as the real party in interest.

In *Cunningham* vs. *Macon & Brunswick R. R.*, *supra*, the case of *Davis* vs. *Gray* was described as "going to the verge of sound doctrine, if not beyond it". And the Court in that case further remarks, as an apparent justification of the extent to which the decision goes, that "in that case, no *affirmative relief* was granted by ordering the Governor and Land Commissioner to perform any act towards perfecting the title of the Company."

Davis vs. *Gray* was put by the Court distinctly upon the authority of *Osborn* vs. *Bank*, of which it was said that it decided "three things."

(1.) A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statue of the United States, when such execution will violate the rights of the complainant.

(2.) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the Court may proceed to decree against the officers of the State, in all respects as if the State were a party to the record.

(3.) In deciding who are parties to the suit, the Court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest. A State can be made a party only by stating the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

Although *Davis* vs. *Gray* is a perfectly clear and express decision of this Court, about the meaning

of which there can be no doubt, it is not necessary in the present case, to invoke its authority to its full extent. It not only decides all, but much more than all, that is required in the present case.

McComb vs. Board of Liquidation, 92 U. S., 531, is in every respect a leading case upon the present subject, the opinion being a very elaborate and careful one, the case being decided by an unanimous Court, and the jurisdictional question being decided expressly upon the authority of *Osborn* vs. *Bank*, and *Davis* vs. *Gray*.

The suit was " for a perpetual injunction to restrain the Board of Liquidation of the State of Louisiana, from using certain bonds for the liquidation of a certain debt claimed to be due from the State to a private corporation, and from issuing any other State bonds in payment of such alleged debt.

This Court distinctly considered the jurisdictional question involved, arising from the fact that the suit was against *State officers*, as follows (page 540–541) :

" In our judgment, therefore, the Court below " was right in granting the injunction as to the con- " solidated bonds, *if the defendants, occupying* " *the official position they do, are amenable to such* " *a process.*

" On this branch of the subject *the numerous* " *and well considered cases heretofore decided by* " *this Court leave little to be said.* The objection " to proceeding against State officers by *mandam-* " *us* or injunction are, first, that it is in effect, pro- " ceeding against the State itself; and secondly, that " it interferes with the official discretion vested in " the officers. It is conceded that neither of these " things can be done. A State, without its consent, " cannot be sued by an individual ; and a Court " cannot substitute its own discretion for that of

"executive officers in matters belonging to the "proper jurisdiction of the latter. But it has been "well settled that, when a plain official duty, re- "quiring no exercise of discretion, is to be per- "formed, and performance is refused, any person "who will sustain personal injury by such refusal "may have a *mandamus* to compel its perform- "ance ; *and when such duty is threatened to be "violated by some positive official act, any person "who will sustain personal injury thereby, for "which adequate compensation cannot be had at "law, may have an injunction to prevent it.* In "such cases, the writs of *mandamus* and injunc- "tion are somewhat correlative to each other. In "either case, *if the officer plead the authority of "an unconstitutional law, for the non-perform- "ance or violation of his duty, it will not prevent "the issuing of the writ.* An unconstitutional "law will be treated by the courts as null and "void. *Osborn* vs. *Bank of the United States*, 9 "Wheat., 859 ; *Davis* vs. *Gray*, 16 Wall 220."

United States vs *Lee*, 106 U. S. 196, was a suit in ejectment brought by Lee against Kaufman and Strong, to recover possession of what is known as the Arlington estate, in Virginia.

Kaufman and Strong holding merely as the agents and representatives of the United States, the land in question being in use as a national cemetery, for the most part, the United States, though not a party to the suit, defended the action by its proper law officers, though declining to submit itself as a defendant to the jurisdiction of the Court. The writs of error in this Court were taken and prosecuted, one by the United States, *eo nomine ;* the other by the Attorney General, in the names of Kaufman and Strong, the defendants below.

This Court states one of the two questions arising in this Court on the record, as follows :

"I.—Could any action be maintained against "the defendants for the possession of the land in "controversy under the circumstances of the re- "lation of that possession to the United States, "however clear the legal right to that possession "might be in the plaintiff?"

At page 204, the Court states that the plaintiffs in error in behalf of the United States, assert the proposition "that the Court can render no judg- "ment in favor of the plaintiff against the defen- "dants in the action, because the latter hold the "property as officers and agents of the United "States, and it is appropriated to lawful public "use;" and the Court says,

"This proposition rests on the principle that the "United States cannot be lawfully sued without "its consent, in any case, and that no action can "be maintained against such individual without "such consent, where the judgment must depend "on the right of the United States to property "held by such persons as officers or agents for the "Government.

"The first branch of this proposition is conceded "to be the established law of this country and "of this Court, at the present day; the second as a "necessary or proper deduction from the first is "denied."

The Court then proceeds with an elaborate examination of American and English cases, and especially of the cases in this Court which bear upon the general question, and cites especially and relies especially upon Osborn *vs.* The Bank and Davis *vs.* Gray, saying of the former case: "It is "a leading case, remarkable in many respects and "in none more than those resembling the one "before us;" and proceeds to quote those portions of the opinion of Chief Justice Marshall in which the doctrines which have already been cited are most prominently stated. The Court then refers to *Davis* vs. *Gray*, as having cited with approval

Osborn vs. *Bank of United States*, and quotes from the former decision and puts in italics the following words: "*Making a State officer a party does* "*not make the State a party, although her law* "*may have prompted his action and the State* "*may stand behind him as a real party in inter-* "*est;*" and the Court adds: "Though not pre- "pared to say now that the case can proceed "against the officer in 'all respects' as if the State "were a party, this may be taken as intimating in "a general way the views of the Court at that "time." And the Court continues:

"This examination of the cases in this Court es- "tablishes clearly this result: that the proposi- "tion that when an individual is sued in regard to "property which he holds as officer or agent of the "United States, his possession cannot be disturbed "when that fact is brought to the attention of the "Court, has been overruled and denied in every "case where it has been necessary to decide it; "and that in many others, where the record shows "that the case as tried below actually and clearly "presented that defence, it was neither urged by "counsel nor considered by the Court here, although "if it had been a good defence it would have "avoided the necessity of a long inquiry into "plaintiff's title and of other perplexing ques- "tions, and have quickly disposed of the case."

In concluding the opinion the Court says:

"If it be said that the proposition here esta- "blished may subject the property of the officers of "the United States, and the performance of their "indispensable functions, to hostile proceedings "in the State Courts, the answer is that no case "can arise in a State Court where the interests, "the property, the rights or the authority of the "Federal Government may come in question, "which cannot be removed into a Court of the "United States, under existing laws. In all "cases, therefore, where such questions can arise,

"they are to be decided, at the option of the "parties representing the United States, in Courts "which are the creation of the Federal Govern- "ment. * * * From such a tribunal no well- "founded fear can be entertained of injustice to "the Government or of a purpose to obstruct or "dimish its just authority."

And the judgment of the Court below was affirmed.

Poindexter *vs.* Greenhow, 114 U. S., 270, was decided upon the authority especially of Osborn *vs.* Bank and United States *vs.* Lee. In that case an action of detinue was brought by a taxpayer, who had duly tendered tax receivable coupons in payment of his taxes, against the person who, under color of office, as tax collector, acting under a void law, passed by the Legislature of the State, had refused to receive such tender, and had proceeded, by seizure and sale of the property of the plaintiff, to enforce the collection of such taxes; and it was held that such action was against the tax collector personally, as a wrong-doer, and not against the State, within the meaning of the 11th amendment.

And it was further held that such tax collector, when sued as a wrong-doer, cannot rest on the assertion of his defence as an officer of the State, but is bound to establish that he has acted under a valid authority, and must produce a valid law of the State which constitutes his warrant; thus following, almost in identical terms, the decision and language of this Court in Cunningham *vs.* Macon and Brunswick Railroad Company, 109 U. S., 446.

As we shall have occasion to examine the case of Poindexter *vs.* Greenhow more fully, hereafter, it is not necessary at this point to enter into a full examination of that case.

In Allen *vs.* Baltimore & Ohio Railroad Company, 114 U. S., 311, Allen, the defendant below, was the auditor of the State, the other defendants being the Treasurer of the State and the Treasurer of Augusta County, in Virginia. In that case an injunction was sought to prevent the collection of taxes, after a tender of payment in tax receivable coupons; and it was held as sanctioned by repeated decisions of this Court, and as common and unquestioned practice in similar cases, that the remedy by injunction was authorized.

In this case, also, the Court relies upon Osborn *vs.* The Bank, as well as upon Board of Liquidation *vs.* McComb, and numerous other cases therein cited.

The case of Ralston *vs.* Missouri Fund Commissioners, 120 U. S., 390, was a suit brought by a private individual to restrain the Fund Commissioners from selling the Hannibal & St. Joseph Railroad; and this Court, in deciding the case says:

"It is next contended that this suit cannot be "maintained, because it is in its effect, a suit against "the State, which is prohibited by the 11th amend- "ment of the Constitution of the United States; and "Louisiana *vs.* Jumel, 107 U. S., 711, is cited in "support of this position. But this case is entire- "ly different from that. There the effort was to "compel a State officer to do what a statute pro- "prohibited him from doing. Here the "suit is to get a State officer to do "what a statute requires of him. The litiga- "tion is with *the officer*, not *the State*. The law "makes it his duty to assign the liens in question "to the trustees, when they make a certain pay- "ment. The trustees claim they have made this "payment. The officer says they have not; "and there is no controversy about his duty if "they have. The only inquiry is therefore, as to "the fact of a payment according to the require-

" ments of the law. If it has been made, the trus-
" tees are entitled to their decree. If it has not, a
" decree in their favor, as the case now stands,
" must be denied. But as the parties are all before
" the Court and the suit is in equity, it may be
" restrained, so as to determine what the trustees
" must do in order to fulfill the law, and under
" what circumstances the Governor can be com-
" pelled to execute the assignment which has been
" provided for."

Here the distinction is clearly drawn between a suit to " compel a State officer to do what a statute has prohibited him from doing " and a suit " to get a State officer to do what a statute requires of him ;" and it would seem to be a just conclusion from this distinction that, although the defendant is a State officer, if the suit is to compel him to do what a statute requires and, *a fortiori*, to restrain him from doing what a statute directs, when such statute is seen to be unconstitutional, there can be no objection to the suit on account of the official character of the defendant.

The cases which have now been examined seem to be sufficient to illustrate the line of cases which we have above described as asserting and enforcing somewhat broadly and fully the right of the Courts to coerce or restrain State officers, in the interest of private parties who show themselves aggrieved by actual or threatened action of such State officers.

But upon the general question, which we have said is all that is involved in the present proceedings,—whether a State officer may be enjoined from doing what an unconstitutional State statute directs him to do,—a multitude of other authorities in this Court might be cited. For example, the line of

cases which may be said to begin with *Dodge* vs. *Woolsey*, 18 How., 331, decided in 1855, in which the tax officers of the State of Ohio were restrained from enforcing the collection of unconstitutional taxes, or taxes levied under an unconstitutional law of Ohio,—a case which has been followed in this Court by numerous other cases which it is unnecessary to cite here.

Also the cases of *Hawes* vs. *Oakland*, 104 U. S., 450, and *Huntington* vs. *Palmer*, 104 U. S., 482, decided in 1881, in the former of which a shareholder in the Contra Costa Water Works brought a bill in equity against the city of Oakland, the Water Works Company and its directors, to restrain the Company from furnishing the city of Oakland with water free of charge, beyond what the law required it do ; and in the latter of which an individual filed his bill against the tax collector of the County of Alameda, California, and the Central Pacific Railroad Company, on behalf of himself and all other stockholders &c., to enjoin and restrain the company from wasting and misapplying its funds, as it threatens to do, by paying certain taxes upon its property which he alleges were unlawfully and unconstitutionally assessed against it.

The authority of the Circuit Court of the United States to grant the injunction asked for in each of these cases is asserted and maintained upon the principle decided in *Dodge* vs. *Woolsey*.

To the same effect is the long line of cases of which *Tomlinson* vs. *Branch*, 15 Wallace, 460, is an example, in which this Court has sustained the relief by injunction against the violation of a contract of exemption from taxation by the levy of taxes by the State officers.

Another notable instance of the application of the same principle is *Cummings* vs. *National Bank*, 101 U. S., 153, decided by this Court in 1879, where a National Bank of Toledo brought its bill in equity to enjoin the Treasurer of Lucas County from collecting a tax wrongfully assessed upon the shares of its stockholders, and in which it was held "that when a rule or system of valua-"tion for purposes of taxation is adopted, by "those whose duty it is to make the assessment, "which is intended to operate unequally, in vio-"lation of the fundamental principles of the Con-"stitution, and when this principle is applied not "solely to one individual but to a large class of in-"dividuals or corporations, equity may properly "interfere and restrain the operation of the uncon-"stitutional exercise of power;" and "that the ap-"propriate mode of relief in such cases is, upon "payment of the amount of the tax which is equal "to that assessed on other property, to enjoin the "collection of the illegal excess."

In *Transportation Company* vs. *Parkersburg*, 107 U. S., 691, the city of Parkersburg built a wharf on the banks of the Ohio river, and prescribed, by ordinance, certain rights of wharfage. The transportation Company, owning enrolled and licensed steamers, lying between Pittsburg and Cincinnati, and touching at intermediate points, complained that the wharfage was extortionate, and thereupon filed a bill in the Circuit Court of the United States, praying that the prosecution of a suit brought by the city in a State Court. to collect the wharfage, might be enjoined, and that the ordinance levying the wharfage might be declared void, and for other relief. In this case the Court says that so much of the bill as seeks to "restrain legal proceedings al-

" ready instituted before the Recorder of Parkers-
" burg before bill was filed, cannot be maintained
" if Section 720 of the Revised Statutes applies to
" suits originally brought in the Circuit Courts by
" virtue of the Act of March 3, 1875." But " that
" portion of the bill which seeks to have the wharf-
" age ordinance declared void, and to restrain any
" further collections under it and any further in-
" terference with the right of the complainant to
" the free navigation of the Ohio river, is not open
" to this objection.

II.

It has been urged in the Court below, against the jurisdiction of the Circuit Court in the present case, that that Court is prevented from issuing an injunction or restraining order, by the provision of Section 720 of the Revised Statutes of the United " States, which is in these words:

"The writ of injunction shall not be granted by "any Court of the United States to stay proceed-"ings in any Court of a State, except in case "where such injunction may be authorized by " any law relating to proceedings in bankruptcy."

This section has been in force since the Act of May 2d, 1793; and if it is applicable to the present case, it would deprive the Circuit Court of power to issue the restraining order in question.

Our position in answer to this objection is, that Section 720 applies only to proceedings which are actually begun or pending in a State Court at the time when the writ of injunction is applied for and issued.

In Fisk *vs.* Union Pacific Railway Company, 10 Blatchford, 518, a corporation which was a defendant in a suit in equity and which might be held liable to respond pecuniarily to the plaintiff in the suit, and which had made one attempt to procure its own dissolution, was enjoined from taking any proceedings for its own dissolution, or for the appointment of a Receiver of its effects or for the distribution thereof among its stockholders or any other person, and from making any distribution or transfer of any of its assets.

In this case, which was decided in 1873, the provision of Section 5 of the Act of March 2, 1793,—which is now Section 720, Revised Statutes,—was brought in question; and Blatchford, Judge, held:

"The provision of Section 5 of the Act of March "2, 1793, that a writ of injunction shall not be "granted to stay proceedings in any Court of a "State, has never been held to have, and cannot "properly be construed to have, any application "except to proceedings commenced in a Court of a "State before the proceedings are commenced in a "Federal Court. Otherwise, after suit brought in a "Federal Court, a party defendant could, by resorting to a suit in a State Court, defeat, in many ways, "the effective jurisdiction and action of the Federal "Court, after it had obtained full jurisdiction of "person and subject matter. Moreover, the provisions of the Act of 1793 must be construed in "connection with the provision of Section 14 of the "Act of September 24, 1789, that the Federal "Courts shall have power to issue all writs which "may be necessary for the exercise of their respective jurisdictions. It may properly be considered "as necessary for the continued exercise of the "jurisdiction of this Court over the corporation in "question that it should be restrained from taking "steps in a State Court to put itself out of existence.

"The injunction asked for is proper to restrain "the corporation from taking any proceedings for "its own dissolution, or for the appointment of a "receiver of its effects or for the distribution "thereof among its stock holders or any other per- "sons, and from making any distribution or trans- "fer of any of its effects."

This decision seems to have been well considered and the parties to the suit were represented by eminent counsel on each side.

In the *State Lottery Co.*, vs. *Fitzpatrick*, 3 Woods 220, a bill in equity alleged that the State had chartered a Lottery Company with the right to exercise its functions for twenty-five years, paying the State annually the sum of $40,000, and had passed a subsequent Act repealing the charter, and making it a penal offence to carry on the business authorized by this charter, and prayed an injunction against all the defendants to restrain them from "ordering or allowing any prosecution, arrest "or seizure, of the plaintiffs, or any of their agents "or servants, customers or persons in any man- "ner connected with the Lottery Company, for "doing or performing, or being concerned in any "act or acts, of the drawing of lotteries, or the sale "or purchase of tickets of said Lottery Company, "and from interfering with them by prosecution "or otherwise in the doing of any act or carrying "out any purpose authorized by the charter of the "Lottery Company.

The Court, Billings J., in an elaborate opinion, citing many authorities, concludes as follows:

"The Constitution has already enjoined the State "from committing the wrong by impairing the ob- "ligation of its contract. But this injunction is "defied, and we are told that because the infliction

" of the injury is done in the name and by the di-
" rection of a State, there can be no inhibition or
" restraining order. To hold this would be to sub-
" ordinate the Constitution of the United States to
" the authority of the Legislative Act, and to dis-
" regard the great mandate of that Constitution
" which commands that "the Judges in every State
" " shall be bound thereby; anything in the laws
" " of any State to the contrary notwithstanding."

And the injunction was granted.

It is proper to note here that the last-cited case was decided before the case of *Stone vs. Mississippi* (101 U. S., 814), in which this Court held that a charter of a Lottery Company is not a contract within the meaning of the Constitution. But this does not affect the point for which we cite the case here.

In *Moore* vs. *Holliday, State Auditor* (4 Dillon, 52), the bill was filed by stockholders of the Hannibal & St. Joseph Railroad Co., against the State Auditor to restrain the collection of various taxes, and the Court, Dillon, J., in his decision, says:

" 2. So far as the bill in this case asks to enjoin
" suits already brought and now pending in the
" State Courts to enforce the collection of any of
" the taxes complained of, it is sufficient to remark
" that an express statute of the United States has
" prohibited such interference since the Act of
" March 2, 1793, re-enacted in Section 720 of the
" Revised Statutes.

" 3. So far as the bill seeks to enjoin the taxes
" for 1874 by reason of the alleged illegal action of
" the Board of Equalization, my opinion is that
" the bill presents no sufficient grounds for the al-
" lowance of the writ of injunction. By that act

"the State Board was made an assessing as well
"as an equalizing body.

"4.—But as to the taxes of 1873, the bill makes
"just such a case as was made in several cases in
"this Court in respect to the taxes for that year
"against the Iron Mountain and other companies
"and where this Court (Miller, Dillon and Treat,
"Judges, concurring), made an order for the allow-
"ance of an injunction on the company's paying
"to the proper officers by a short day the amount
"of taxes which would be due on the basis of the
"valuations fixed by the County Courts; if such
"a payment was made, we would enjoin the excess
"pending the determination of the question; if
"not made the injunction would be denied. * * *
"The injunction may also go against the collection
"of any taxes by the defendants or any of them
"except on the branch roads. In view of the alle
"gations of the bill as to retrospective taxation
"for all the years from 1860 to 1871 inclusive, the
"mode of which and the basis on which as alleged
"the valuation was determined, I think the case
"made is such as to justify the allowance of a
"temporary injunction as to the collection of such
"taxes, not to interfere, however, with the suits
"already brought to enforce them. Counsel must
"understand that we never have interfered, and
"do not intend to interfere with suits actually de-
"pending in State tribunals."

It is manifest that in this case the Court intended to limit its power, as was held in *Fisk* vs. *Union Pacific Railway Company*, *supra*, only to suits actually begun in a State Court and the implication seems to be a necessary one, from the language of the Court, that the power to enjoin *from bringing suits* existed.

In *Live Stock &c., Association* vs. *Crescent City &c.*, 1 Abbott's U. S. Rep.; the complainants prayed for an injunction against the defendants commanding them to suspend all proceedings against the complainants under and by virtue of an Act of the Legislature of Louisiana of March 6, 1869, giving to the corporation defendant the exclusive right to erect and have live stock landings and slaughter houses in and about New Orleans, which Act, the complainants alleged, to be in violation of the Civil Rights Bill, and of the first Section of the 14th amendment of the Constitution.

Judge Bradley, delivering the opinion of the Court, says:

"The application brings up the question whether the Civil Rights Bill applies to such a case as "the present, and whether the 14th amendment of "the Constitution is intended to secure to the citizens of the United States of all classes merely "equal rights, or whether it is intended to secure "to them any absolute rights."

The reporter says that "after intimating an opinion (subsequently modified) that the Civil Rights Bill did not apply to the case, the Court proceeded" to consider the foregoing questions; and on page 404 the Court said: "We feel compelled to "decide that the Act in question is a violation of "one of the fundamental privileges of a citizen, and "that an injunction would have to be granted substantially as prayed for, but for one of the technical objections raised by the answer of the defendants.

"The objection that the Circuit Court of the "United States cannot enjoin proceedings in a "State Court is an objection which cannot be surmounted * * * The remedy of the parties is

"to allow the proceedings to pass to judgment,
"and if the highest Court of the State should de-
"cree against the construction of the 14th amend-
"ment, which is claimed by them and which this
"Court has assented to, then they can carry the
"case by a writ of error to the Supreme Court of
"the United States, and have the whole question
"reviewed."

The report then says that "at the opening of the
"Court on Saturday morning, June 11th, Justice
"Bradley made the following announcement;"
"In the slaughter-house case yesterday, we ex-
"pressed the opinion that the Civil Rights Bill did
"did not apply to the case. * * * This portion
"of the opinion was not written at the time, and
"was somewhat hastily expressed. * * * On
"a more careful examination * * * we are
"disposed to modify our opinion in this respect,
"and to hold, as the counsel on both sides seem
"to agree in holding, that the first section of the
"bill covers the same ground as the 14th amend-
"ment, at least so far as the matters in this case
"are concerned." * * *

"The prayer for injunction will therefore stand
"denied to that extent, but granted as to the resi-
"due, and the rule will be corrected accordingly."

And in pursuance of this announcement the following decree was made in the case: * * *
"And the Court directs that an injunction be issued
"from this Court enjoining and restraining the
"defendant from *commencing or prosecuting any*
"*any other suits upon their Act of Incorporation*
"*than such as are now pending against the said*
"*plaintiffs*, or either of them, *for doing or per-*
"*forming any act embraced in the declarative*
"*clause of this decree, or from suing for any fine*

"*or penalty imposed under said Act of Incor-*
"*poration, or for doing any of* the acts aforesaid,
"and and from interfering with them in the pro-
"secution of their lawful occupations as
"live stock dealers or butchers, or as
"vendors of animal food or animals; and
"the said Court here *excepts from the operation*
"*of this decree the proceedings in any of the*
"*Courts of the State that are now pending*, but
"reserves to said plaintiffs, all other remedies for
"their protection contained in the Constitution of
"the United States and Acts of Congress whereby
"in the lawful pursuits aforesaid they may be de-
"prived of the rights here declared and ascer-
"tained."

The scope and meaning of this opinion and decree is apparent, beyond the need of comment. It distinctly holds that parties about to proceed under an unconstitutional act may be restrained from proceeding by suit or otherwise in the enforcement of said Act.

In *Watson* vs. *Bondurant*, 2 Woods, 166, a citizen of Louisiana filed a petition in the Parish Court of that State, against a citizen of Mississippi, to restrain the execution of a judgment obtained in the State Court by the latter against the former, and the question arose whether the cause was removable to the Federal Court under the Act of March 3, 1875, notwithstanding the fact that the Federal Courts were prohibited, by Section 720 Revised Statutes, from granting an injunction to stay proceedings in a State Court. And Woods, Circuit Judge, held that notwithstanding Section 720, the suit was one that was removable into the United States Court.

In *Haines* vs. *Carpenter*, 91 U. S., 254, a bill was filed in the Circuit Court of the United States for the District of Louisiana, praying that an executor might account for monies received by him from the succession, and that the complainants might be put in possession of property of the decedent ; that the executor might be removed, and that an injunction might issue to restrain the defendants from further prosecuting certain suits then pending in the State Courts, or any other suits or litigation in the premises.

The bill was dismissed by the Court below, on demurrer, and in this Court no counsel appeared for the appellee. The Court holds that the object of the suit was to enjoin and stop litigation in the State Court, where it was then pending, and that this was within the prohibition of section 720.

Diggs vs. *Wolcott*, 4 Cranch, 179, was an appeal from a decree of the Circuit Court for the District of Connecticut, in a suit in Chancery. The appellants had commenced a suit at law against the appellee, in the State Court of Connecticut, upon two promissory notes ; whereupon the appellee filed a bill in Chancery in the Court of the State, against the appellants, praying that the appellants might be compelled to give up the two notes sued on to be cancelled, or be perpetually enjoined from proceeding at law for the recovery thereof.

This suit in Chancery was removed, by the appellants, from the State Court into the Circuit Court of the United States, where it was decreed that the appellants should deliver the notes to the Clerk of the Court, and in default thereof should forfeit $1,500 ; and *that they should be perpetually*

enjoined from proceeding at law for the recovery of said notes, &c.

This Court "being of opinion that a Circuit Court of the United States had not jurisdiction to enjoin proceedings in a State Court," reversed the decree.

It will be seen that this case was a case of proceedings actually pending in the State Court.

Our conclusions from the foregoing authorities are that section 720 has no application to suits not actually depending in the State Courts at the time of the issuing of the restraining order or injunction.

In the present case, it is conceded that no suits had been begun at the time the restraining order was issued.

A somewhat metaphysical argument has been advanced, in answer to the view that the section applies only to suits actually depending, to the effect that the word "stay" in section 720 must be interpreted to cover all steps, acts, and means which may *result in staying* suits in State Courts, including the prevention in any way or any case of the bringing of suits there. This plainly is too elastic and comprehensive. If to "stay" means here, to prevent in any sense, then almost any injunction or restraining order may be said to be forbidden by this section. "Proceedings in a State Court" is a phrase needing no interpretation, commentary, or gloss. It means and must mean, unless excessive refining is to be attributed to our early legislators, (1793) proceedings which are *pending in* a State Court, and not preceedings which may be contemplated or designed to be brought there.

In opposition to the cases now cited is the single case of *Rensselaer & S. R. Co.* vs. *Bennington & R. R. Co.*, 18 Fed. Rep., 617. In that case the bill was brought to restrain the defendant Company from entering upon the railroad of the complainant company under the provisions of an Act of the Legislature of Vermont.

It appears that the Act of the Legislature of Vermont which was in question provided that the defendant Company should have the right to enter upon a part of orator's road, for the purpose of transporting certain freight, and further provided that this right should be exercised under such reasonable rules and regulations as might be established by the orator's road; "and that in default "of the making by the orator of such regulations "to the defendant for thirty days, or on the making "of unsatisfactory regulations, proceedings might "be had in the Supreme Court of the State, for "making and enforcing such regulations."

It appeared that the orator had suffered the thirty days to pass without making the regulations; and the bill alleged that the defendant threatened to take proceedings in the Supreme Court to have them made and established; and the defendant, in its answer, admitted that it intended to commence such proceedings in the Supreme Court.

The bill prayed that the defendant, its agents, &c., be restrained from running its cars and engines upon the orator's road, and that it, its officers, agants, &c., be restrained from making application to the Supreme Court of the State to have rules and regulations established, &c.

The Court expressly states that "as no action or "interference, except such as may be authorized "and had under the proceedings in the Supreme

"Court, is threatened or apprehended, there is no "relief to which the orator is here entitled, unless "it is relief from those proceedings. The prose- "cution of those proceedings, or the carrying out "of such order or decree as the Supreme Court "may make upon them, must be restrained, if "anything effectual is to be done in this case. The "restraint of the execution or complete fulfillment "of proceedings of a judicial nature is in effect "the same as a restraint of the proceedings them- "selves."

The Court refers to several cases in this Court, and holds that section 720 applies in that case, and that the bill cannot be entertained.

If the circumstauces and facts of this case would make it an authority, in opposition to the cases which have been above cited, it may be said to stand alone, and to be the only authority which holds that the United States Courts are prohibited from restraining parties from bringing suits which have not already been begun in the State Courts, by section 720.

We conclude, therefore, upon all the authorities, that Courts of the United States are not prohibited by section 720 from enjoining the bringing of suits in the State Courts, but only from staying proceedings which have already been begun.

It is admitted that in the present case no proceedings had been begun in any Court, at the time the restraining order of June 6, 1887, was made.

III.

But it is said that the complainants in the present case do not show themselves to have such an interest in the subject matter of the suit as to give them a standing in the Court below.

The substantial averments of the bill upon this point are:

(1.) That the complainants were the owners of $100,000 worth of tax-receivable coupons of Virginia, for which they had paid over $30,000 (fol. 33).

(2.) That they have sold $50,000 of that amount for $15,000, or more, to tax-payers of Virginia, who have tendered the same to the proper State officials in payment of their taxes; and that said officers have refused to receive the same (fol. 33).

(3.) That if the officers of the State are permitted to enforce the Act of May 12, 1887, the complainants will be unable to sell the remaining $50,000 of their coupons to the tax-payers of that State, at any price, and thus that their entire property in the same will be destroyed (fol. 35).

It is unnecessary to do more than observe here that the averments of the bill must be taken as true, for the purposes of these proceedings, no answer to the bill having been filed.

We have therefore, (1), the case of complainants, who have sold $50,000 worth of coupons to the tax-payers of Virginia, which they have tendered for taxes and which have been refused; (2), and who hold $50,000 worth of similar coupons, which they allege will be totally destroyed in value by the enforcement of the Act in question.

The complainants further aver (fol. 35), that in

any event, by the enforcement of said Act, they will lose a sum greater than $2000; and they further especially aver that if said Act is enforced, "the reclamations made upon them and which they "will have to pay will amount to more than $2,000; "and if it is enforced they will be unable to sell "any more of said coupons so purchased by them, "and the loss they will thus sustain will be far "more than $2000, exclusive of costs and interest."

The question arises, upon these averments, whether they are sufficient to give the complainants a standing in court.

The only authorities which have been heretofore cited to show a want of sufficient interest in this suit are Marye *vs.* Parsons, 114 U. S., 327, and Hagood *vs.* Southern, 117 U. S., 52. Under these decisions it is urged that the complainants have no legal ground of complaint, because they are not taxpayers and have never, as such, tendered any coupons; and that as to them the State has passed no law violating the obligation of her contract.

Marye *vs.* Parsons was a bill in equity, filed by a citizen of New York against Marye, auditor, and other tax collectors of the State, in which the complainant averred that he was the owner of over-due coupons to a large amount; and in which he charged that certain statutes of the State which forbade the tax officers of the State to receive these and similar coupons in payment of taxes to the State, impaired the obligation of the contract embodied in the coupon, and that he had made arrangements with sundry tax payers of Virginia to use his coupons in payment of taxes, but that unless the said officers will receive them, the tax-

payers will not use them; and thus the complainant's coupons will be destroyed in value.

Upon this bill the relief asked was that the State officers be required to "perform specifically the "contract aforesaid and receive his said coupons "in payment of all dues and taxes above named "immediately upon their being tendered therefor "by any tax payer;" and for "a preliminary re- "straining order and injunction, enjoining and "restraining the said defendants, their agents &c., "from refusing to accept any of complainant's "coupons in full payment of taxes, &c."

Upon this bill, this Court said that it was a clear case, as stated, of *damnum absque injuria;* that while, without doubt, there was a contract that the State should pay the coupons at maturity, a contract which inured to the benefit of the complainant, yet the contract to receive the coupons in payment of taxes had not been broken, because there had been no tender of his coupons; that personally the complainant had no right to offer them for such purpose, because he owed no taxes to the State; and that the bill showed nothing to prevent him from transferring his coupons to others who had a legal right to use them. And the Court said:

"To enable the complainant to avail himself of "the benefit of his contract with the State to re- "ceive his coupons in payment of taxes, he must "first assign them to some one who has taxes to "pay, as he has not; but when he does so, by the "the assignment he has lost his interest in the "contract and his right to demand its performance, "all right to which he has transferred with the "coupons. It is only when in the hands of the "tax-payers, or other debtors, that the coupons

"are receivable in payment of taxes and debts "due to the State."

From this statement of the bill and the decision of the Court, it will be seen that Marye *vs.* Parsons presents these features :

(1.) That the relief sought was a mandatory injunction, which was intended to effect a specific performance of the contract to receive coupons in payment of taxes ;

(2.) That the complainant, having no taxes to pay, could only avail himself of the benefit of the contract to receive the coupons in payment of taxes, by transferring them to a tax payer ;

(3.) That having transferred them, he would have extinguished his own interest in the coupons and would have deprived himself of any further right to insist upon the performance of the State's contract.

These are the grounds and the extent of this decision.

In the present case, however, it is seen that,

(1.) Unlike Marye *vs.* Parsons, the only relief which the complainants seek is the preventive relief of an injunction to restrain State officers from destroying the value of the coupons ;

(2.) The complainants in this case *have* transferred $50,000 of their coupons to taxpayers, who have tendered them, and they have been refused ; and

(3.) That as to the remaining $50,000, the execution of the Act of May 12, 1887, as is alleged, will destroy entirely the value of these coupons.

Manifestly, therefore, the case of Marye *vs.* Parsons does not control the present case.

Hagood *vs.* Southern, 117 U. S., 52, has already been stated in this argument. The only point in it which bears upon the present question is that the Court there says of the complainant, that: "As "a matter of law, the contract cannot be said to "be broken until the scrip has been tendered for "taxes due from a holder and been refused; nor "that the legal right is threatened unless he is in "a situation to make a present tender for that pur- "pose. He has no legal right to have this scrip "received for taxes, unless he owes taxes for which "it is receivable; and in order that it may be used "for the payment of the taxes of another, he must "transfer it to the new holder, and that would di- "vest himself of all right to enforce a contract to "which he is no longer a party and in which he has "ceased to have a legal interest."

How far, then, the case of Hagood *vs.* Southern differs from the present case need not further be pointed out.

If the averments of the bill, therefore, in the present case, namely, (1.) That as to the coupons sold by the complainants to taxpayers and tendered for taxes by such taxpayers, the execution of the Act of May 12, 1887, will give a right of recourse or reclamation upon the complainants; and (2) that as to the coupons remaining in the hands of the complainants the execution of that act will destroy their value by making it impossible to transfer them to taxpayers, in order that they may be tendered for taxes,—are well founded, then, certainly, the cases of Marye *vs.* Parsons and Hagood *vs.* Southern do not control the present case.

This brings us to an examination of the Act of

May 12, 1887, which appears in the record (fols. 8 to 11).

By that act it is provided in the first section that all taxes for which coupons have heretofore or may hereafter be tendered and not accepted, and not otherwise paid, may be recovered in the Circuit Court of the State, or, if the tender was made to the Auditor of Public Accounts, in the Circuit Court of the City of Richmond, which Court is given jurisdiction without regard to the amount of the taxes, and though the amount be less than twenty dollars.

The act further provides that the proceeding shall be by motion on behalf of the Commonwealth, on ten days' notice, and shall be instituted and prosecuted by the attorney of the Commonwealth or corporation in which the proceeding is instituted; or, if it is instituted by direction of the Auditor of Public Accounts, in the Circuit Court of the City of Richmond.

Section 5 provides that, "if the defendant relies "on a tender of coupons as payment of the taxes "claimed, he shall plead the same specifically and "in writing, and file with the plea the coupons "averred therein to have been tendered, and the "Clerk shall carefully preserve them. Upon such "plea filed, the burden of proving the tender and "the genuineness of the coupons shall be on the "defendant. If the tender and genuineness of the "coupons be established, judgment shall be for "the defendant on the plea of tender."

Section 6 provides that, "If the defendant fails "in his defense, and the taxes claimed are found "to be due to the State, any coupons filed by him "with a plea of tender (and not spurious), shall be

" returned to him, and there shall be judgment for " the Commonwealth," &c.

The bill in the present case further alleges the existence of two other acts of the Legislature of Virginia, passed respectively January 21st and January 26th, 1886, by the first of which it is, in terms, provided : " That expert evidence shall not " be received to prove the genuineness of any paper " or instrument made by machinery or in any " other manner than by the actual or personal " handwriting of the party to be charged, or his " agent " (Acts Assembly Virginia, 1885 to 1886, page 36) ; and by the second of which it is provided : " That in the trial of any issue involving " the genuineness of a coupon appearing or pur- " porting to have been cut from any bond author- " ized by law to be issued by the State of Vir- " ginia, or by any city, county or corporation, the " defendant may demand the production of the " bond, and thereupon it shall be the duty of the " plaintiff to produce such bond, with proof that " the coupon was cut therefrom." (Acts Assembly Virginia, 1885 to 1886, page 40.)

Giving effect to these two acts, in connection with the act of May 12, 1887, it will be clearly seen that the result is :

(1.) That in every case in the State of Virginia in which coupons have heretofore or may hereafter be tendered for taxes, the Commonwealth's officers are required to sue the the taxpayers so tendering coupons, for the amount of his taxes ;

(2.) That upon the trial of such suit the burden of proving the tender and the genuineness of the coupons is put upon the defendant.

(3.) That no expert evidence is admissible upon the trial of the issue of genuineness, the coupon

being made by machinery and not by the actual or personal handwriting of any State officer; and

(4.) That upon the trial of such issue the State is permitted to require the production of the bond from which the coupon has been cut, and the tax-payer is thereupon required to produce the same and to prove that the coupon in question was actually cut therefrom.

The bill avers that the complainants do not own or control the bonds from which the coupons in question have been cut.

The Act of May 12, 1887, as has been seen, further provides that if the defendant fails in his defence,—that is, the defence of the tender and genuineness of the coupons,—"any coupon filed by him with a plea of tender, and not spurious, shall be returned to him;" the act having previously provided in the 5th section that the Clerk shall "carefully preserve the coupons which the defendant is required to file with his plea of tender."

Of course, if the defendant fails in his defence of the genuineness of the coupons, the judgment of the Court will be that those coupons are spurious; and hence they are not, according to the terms of the act, to be "returned to him;" but "the Clerk shall carefully preserve them."

The plain effect of all this is that under the Act of May 12, 1887, in every case of the tender of coupons heretofore or hereafter, the tax-payer is subjected to a suit for his taxes, notwithstanding such tender, and upon the trial of the suit he is compelled to file his coupons with the Clerk; he is next required to produce the bond from which his coupon was cut and to prove that it was actually cut therefrom; he is

next forbidden to introduce expert evidence of the genuineness of the coupons, though the coupons are engraved and not signed manually ; and thereupon if he fails in his defence, as he inevitably must fail, the judgment of the Court will be that he has failed to establish the genuineness of his coupons ; and that hence, being spurious, they are not to be returned to him, but to remain in the custody of the Clerk.

It is, therefore, as clear as a mathematical demonstration, that the effect of the Act of May 12, 1887, *is to sequester, confiiscate and destroy the coupons which may have been tendered heretofore or which may hereafter be tendered.*

This, then, is the case presented by the present bill ; the complainants were the owners of a large amount of coupons, one half of which they have sold to taxpayers who have tendered the same for taxes, which have been refused. They are, therefore, each and all of them, certain to be prosecuted by the officers of the State for non-payment of taxes ; and it is equally certain that upon the trial of such a prosecution they must fail to prove the genuineness of their coupons; and those coupons will therefore be forever sequestered in the hands of the State, and their value forever destroyed ; that as to the other half of complainants' coupons, they are still held and owned by them, and that the enforcement of the act of May 12, 1887, will certainly prevent any tax payer of Virginia from purchasing them for tender for taxes; and hence their value is as certainly destroyed as is the value of those which have been sold to tax payers and tendered by them for taxes.

Who shall say that this does not constitute such an interest on the part of these complainants as war-

rants them in coming into a Court of equity for appropriate relief?

Certainly, the cases of Marye *vs.* Parsons and Hagood *vs.* Southern do not, to the remotest degree, stand in their way.

IV.

It was a very notable and significant fact, to which the learned Circuit Judge alludes in his opinion in this case, that upon the argument of the cause below, no attempt was made by any of the learned counsel who represented the State to defend the constitutionality of the Act of May 12, 1887. The substantial attitude of the State on that occasion was not unlike that of a famous criminal in New York, who responded to the most direct charges of enormous frauds, simply, "What are you going to do about it?" Such was the reply of Virginia to our challenge of the constitutionality of this monstrous act: "We do not deny its unconstitutionality. We only deny that you have any right to raise that question or to seek to defeat its execution."

And we do not hesitate to say that the villainy and disgrace in the first case is less than in the second, by as much as the honor and power of a State is greater and more sacred than that of an individual.

Although the unconstitutionality of the Act of May 12, 1887, was not denied on the argument below, and although no attempt whatever was made to defend the Act as a valid and constitutional law, yet we are advised that an effort has been made by one of the counsel for the petitioners, to offer

what is called an argument in support of the constitutionality of that Act, before this Court.

In that argument is seems to be imagined that the Acts of January 21st and January 26th, 1886, which have already been referred to and which require the production of the bond from which the coupon is cut, and forbid the use of expert testimony in proof of the genuineness of the coupons, are considered by us as making the Act of May 12, 1887, unconstitutional, on the ground, as we suppose, that those Acts, construed and taken with the Act of May 12, 1887, do constitute an embarrassment to the tax payer in proving the genuineness of coupons.

This theory of the grounds of the unconstutionality of the Act of May 12, 1887 is not ours, in any sense ; and if it is anybody's, it must be described as the curious invention of a fanciful mind.

We assert the total and palpable unconstitutionality of the whole Act of May 12, 1887, on account of the provisions of that Act itself. That Act, in its foreground, directs and requires the officers of the State to bring suits for the recovery of taxes from all taxpayers who have already tendered or who may hereafter tender, coupons of the tax-receivable bonds of Virginia, in payment of their taxes. This alone stamps the Act as not only unconstitutional, but as a flagrant and open contempt of the solemn and repeatedly affirmed decision of this Court in Poindexter *vs.* Greenhow.

Inasmuch as we consider that everything that is to be decided in the present case, was decided in the case of Poindexter *vs.* Greenhow, we are led to state that case with special fullness and care.

Poindexter brought an action in detinue against

Greenhow, tax collector, for the recovery of specific personal property which had been seized by the defendant, as tax collector, after Poindexter had made a tender in payment of his taxes, of tax-receivable coupons.

In that case it was held that "a lawful tender of "payment it equivalent to actual payment, either "being sufficient to deprive the collecting officer "of all authority for further action and making "every subsequent step illegal and void."

This Court not only decided as above, but supported its decision by the amplest reference to authorities, as well as by the most satisfactory course of reasoning.

Having decided as above, it followed that the act of the tax collector, in seizing the property of Poindexter, was illegal and unwarranted. Upon this point the Court said:

"In doing so, (that is, in seizing the plaintiff's "property), he ceased to be an officer of the law "and became a private wrong-doer. It is the sim-"ple case in which the defendant, a natural pri-"vate person, has unlawfully, with force and arms, "seized, taken and detained the personal property "of another. * * * The right of recovery would "seem to be complete, unless this case can be met "and overthrown on some of the grounds main-"tained in argument by counsel for the defendant "in error."

There is not the slightest doubt about the import or fact of this decision, as we have now stated it. It cannot be disputed, except by those who would argue against the sun.

Following the decision as above stated, the Court proceeded to examine, in their order, the other

grounds upon which the right of Poindexter to recover was disputed, and held;

(1.) That the coupons are not bills of credit; and

(2.) That the suit of Poindexter was not a suit against the State.

Upon this latter question the decision of Poindexter *vs.* Greenhow may be described as the most important and express decision upon that subject which has been rendered by this Court since Osborn *vs.* Bank, a period of over 50 years.

The decision and the effect of Poindexter *vs.* Greenhow is that any Act of the State of Virginia which directs any proceeding against a tax-payer, for the purpose of compelling him to pay the same taxes again, after a tender of coupons, is unconstitution and void.

The Act of May 12, 1887, is, upon this broad ground, which is completely covered by the decision of Poindexter *vs.* Greenhow, *totally and irredeemably unconstitutional.*

Of the argument which seeks to excuse and palliate the Acts of January 21st and January 26th, 1886, it is only necessary to say that those Acts speak for themselves and cannot be mitigated in their mischief and invalidity.

As to the Act of January 26th, 1886, the Supreme Court of Appeals of Virginia, in the case of Cornwall *vs*, Commonwealth, decided in December, 1886, and reported in 11 Virginia Law Journal, No. 2, page 90, (February, 1887,) decided expressly that that Act was not repugnant to the Constitution of the United States, and, more, that "such evidence is not admissible to prove the genuineness of the State's tax-receivable coupons."

The Court in that case says :

"Having tendered coupons in payment of his "taxes, upon verification of the same, the plain- "tiff in error *was required to produce the bond* "*from which the said coupons were cut*, the said "coupons, not being signed by the Treasurer of "the State, nor by any other officer of the State, "but being wholly printed and engraved by "machinery."

" *This is a plain requirement of the law of this* "*State ;* the bond being signed by the State "Treasurer, it was the best evidence of the execu- "tion of both bonds and coupons, if the same had "in fact been executed by any person authorized "by law to bind the State. The plaintiff in error "*refused to produce the bond ;* not alleging any "inability to do so, but claimed that the law of "this State so requiring the bond to be produced "was unconstitutional, in that it was in conflict "with the tenth section, Article I. of the United "States Constitution, which provi des that no "State shall pass any law impairing the obliga- "tion of contract."

" This rule of evidence is in accordance with the "common law principle of evidence in force in "this State, which is in force and applicable to all "the citizens of this State and in no way whatever "affects the obligations of any contract proved or "unproved, real or imaginary. The cited clause "of the United States Constitution has no applica- "tion whatever to rules of evidence prescribed by "the law-making power of this State, to govern "proceedings in her own courts.

" The said provision of the United States Con- "stitution has no application to this case. This is "is a suit against the State of Virginia, and the

"plaintiff in error can only sue the State by her "own consent; and when he avails himself of this "consent he must pursue the remedy as it is pro- "vided by the law; he has no other, in this or any "other forum.

"As to the other question,—that the Court re- "fused to allow the counsel in the case to act as "an expert in the premises and prove the genuine- "ness of the coupons he had been employed to "collect,— we are of opinion that the trial Court "was plainly rignt; *the laws of Virginia forbid "the use of expert testimony in such cases:* and "even though this attorney at law should be an "expert in such matters, he could not be received "as such under our laws, until the Legislature of "Virginia shall see fit to change the law upon the "subject. There is no error in the judgment com- "plained of, and it must be affirmed."

Again in Newton *vs.* Commonwealth and Burruss *vs.* Same, 11 Va. Law Journal, page 93, the same Court decided that the Act of January 26th, 1886, was constitutional in its requirement of the production of the bond from which coupons tendered for taxes were cut, and that when the plaintiff failed to produce such bond, he must fail in his suit. And, further, that the use of expert evidence to prove the genuineness of the State's tax-receivable coupons, when offered, was forbidden by the laws of Virginia, and that the Act which forbade the use of this evidence was not unconstitutional.

We deem it worth while to present the decision in these cases here in full. The Court says:

"These are writs of error to the judgments ren- "dered respectively therein, in the Corporation "Court of Norfolk. They are, like the cases of

"Cornwall *vs.* Commonwealth, coupon cases. In "both of these cases the plaintiffs asserted an "inability to produce the bond from which the cou- "pons had been cut. In Burruss *vs.* Common- "wealth no expert testimony was offered, and "there was no proof of the genuineness of the cou- "pons, unless they could prove themselves. In "Newton *vs.* Commonwealth, Burruss, the above "named plaintiff in error, offered to act as expert "for Newton; but the Court refused to receive his "evidence.

"*The Court did not err in requiring the pro- "duction of the bond from which the coupons "were cut*; the law of this State so requires. *And "the same is true as to the attempted use "of expert testimony.* As has been said, in "Cornwall *vs.* Commonwealth, it is the province "of the Legislature of the State of Virginia to "prescribe rules of evidence to govern the proce- "dure in her own Courts, and the Constitution of "the United States has no application to the sub- "ject. The obligation of a contract is not affected "in any way by a rule of evidence which is pre- "scribed by the law making power of the State, to "apply to proceedings in the Courts of the State.

"The 10th section of the 1st Article of the "United States Constitution has no application to "the subject. These are suits against the State. "In the Burruss case there is no proof at all, and "in the Newton case there is no legal proof. In "both cases the decision is right. The verdict of "the jury ought not to have been set aside by the "Court, and can upon no principle be disturbed in "this Court.

"The judgment in both cases is affirmed."

What shall be said of such decisions of the highest Court of a State? Under the doctrine of these cases, it is in the power of any State to pass laws which, like these, under the guise of prescribing rules of evidence, shall prevent a party interested in a State contract from maintaining any suit whatever in any court of the State. Such a doctrine is too monstrous to be discussed. Its presence upon the pages of the reports of any State marks the lowest ebb and degradation in the tide of repudiation which has swept over Virginia.

We desire to point out here, especially, that what sought in our present case is not an *affirmative* remedy; that is to say, we do not seek to compel the performance of any act whatever on the part of State officers. It does not fall, then, under this aspect, within the principle laid down in Louisiana *vs.* Jumel, or in the separate concurring opinion of the four Justices of this Court in Antoni *vs.* Greenhow. We are seeking to compel the performance of no acts; but simply to restrain the officers of the State of Virginia from destroying the value of our coupons by enforcing the Act of May 12, 1887.

The destruction of our coupons by the enforcement of that Act is equally clear as to the $50,000 which the complainants have sold, and which have been tendered and refused for taxes, and as to the $50,000 which the complainants still hold. As to the first amount, the complainants are liable to make good all that has been paid by the tax payers for those coupons, because under the Act of May 12, 1887, if enforced, they will all be declared spurious; and as to the second $50,000, their value will be destroyed, because no sane man would pur-

chase coupons, at any price, to tender for taxes, if the Act of May 12, 1887, is allowed to be enforced.

This case seems hardly to require a summing up. Its aspects are all so broad and striking as to be obvious upon the argument.

The Act of May 12, 1887, is a flagrant and palpable violation of the Constitution of the United States; its enforcement will destroy the value of all tax-receivable coupons and will expose the complainants to re-payment of the money received for the sale of their coupons, and will equally expose them to the destruction of the value of those which they hold.

The relief which is sought is simply the prevention of a threatened wrong,-not the compelling of the doing of any act, or the control to any extent of the fiscal affairs of the State; nor any interference whatever with the political functions of the State.

The suit is not a suit against the State, within any of the definitions or principles stated in the decisions of this Court heretofore.

The case is completely covered by the two great cases of Osborn *vs.* Bank and Poindexter *vs.* Greenhow.

The stale, as well as false, cry will doubtless be heard again in this case, that the State is only seeking in all this legislation to protect her treasury against spurious coupons, and to save her charitable institutions and her schools from suspension and destruction. These are miserable *pretexts* now, as they have always been since the debased and ruthless politicians of Virginia put them forth for their own unworthy ends.

Upon the first of these pretexts, Mr. Justice Field has put the truth upon record in *Anton* vs. Greenhow, 107 U. S., 793, as follows:

"The weight usually accorded to a recital of "matters of fact in the preamble of an Act, that "the facts were so represented to the Legislature, "cannot be allowed here; for the journals of the "Legislature of Virginia show that it had infor- "mation when the Act was passed, that the very "opposite of the recitals was true,—that there "were no forged or counterfeit bonds or coupons "in existence, as therein stated. The journals "may be referred to in order to show what was "brought to the attention of the Legislature, and "those journals show that in 1880 the House of "Delegates of Virginia appointed a committee to "examine the office of the second auditor, who is "the custodian of all papers relating to the debt "of the State, to ascertain whether there were any "forged or counterfeit bonds or coupons among "them; and the committee reported that they were "unable to find a single forged or counterfeit bond "or coupon; and of the millions of dollars in cou- "pons which had been paid into the treasury since "1871 all were accounted for, except coupons to the "amount of $28,197. As it was the duty of the "officer on receiving the coupons to cancel them, "it must be presumed that they were properly "cancelled by him at the time."

Upon the second of these pretexts, it is only necessary to state the fact: That out of taxes levied and collected by the State of Virginia since her attempt to repudiate these coupons, the State officers have purchased and paid for the so-called "Sinking Fund" of Virginia, the amount of $2,280,643.60;

and for the so-called "Board of Public Works" of Virginia the sum of $163,200, making a total of $2,443,843.60 of taxes misappropriated by the State of Virginia from the moneys which should have been applied to the payment of tax-receivable coupons.

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